JOURNAL

OF THE

SOCIETY OF COMPARATIVE LEGISLATION.

EDITED FOR THE SOCIETY

BY

JOHN MACDONELL, Esq., C.B., LL.D.

AND

EDWARD MANSON, Esq.

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HON. OLIVER WENDELL HOLMES,

CHIEF JUSTICE OF THE SUPREME COURT OF MASSACHUSETTS.

We are indebted to Sir Frederick Pollock for the portrait of the distinguished judge and author Chief Justice Holmes, of Massachusetts. Sir Frederick Pollock writes thus with respect to his friend:

"The following statement of facts is authorised by Chief Justice Holmes, and may therefore be taken as accurate. My learned friends, the Editors, have asked me to add a few remarks of my own. As a friendship extending over a quarter of century, and intimate ever since its first few years, disqualifies me from assuming an impartial attitude, I will merely speak for myself, and say that, among men of anything near my own standing, Chief Justice Holmes is one of the two from whom I have learnt most. The other, about as much junior to me as Chief Justice Holmes is senior, is my friend Mr. F. W. Maitland.

"F. Pollock."

Oliver Wendell Holmes, the son of the well-known novelist and poet, was born in Boston, March 8th, 1841. At the outbreak of the Civil War he joined the 4th Battalion of Infantry, then at Fort Independence, Boston Harbour, where he wrote the poem which he delivered on class day. In the Battle of Ball's Bluff, October 21st, he was wounded in the breast, and was also struck in the abdomen by a spent ball. On March 23rd, 1862, he was commissioned captain. He received a wound in the neck at Antietam, September 17th. In February, 1863, he was Provost-Marshal of Falmouth, Virginia. At Marye's Hill, near Fredericksburg, he received a third wound, in the heel. He was commissioned lieutenant-colonel, 20th Massachusetts, July 5th, 1863, and in 1864 he was appointed A.D.C. on the Staff of Brigadier-General H. G. Wright, and served during General Grant's campaign, down to Petersburg, returning to Washington with the Sixth Corps when the capital was threatened.

In September he entered the Harvard Law School, and received his LL.B. in 1866. In December, 1865, he entered the law office of Hon. R. M. Morse, Boston. He was admitted to the Suffolk Bar, March 4th, 1867, and subsequently was admitted to practise before the United States Supreme Court. He practised his profession first in partnership with his brother, afterward in the firm of Shattuck, Holmes & Munroe. In 1870-1

he taught Constitutional Law in Harvard College, and in 1871-2 was University Lecturer on Jurisprudence. He married Miss Fanny Dixwell, daughter of Epes Sargent Dixwell, Esq., of Cambridge, Massachusetts, 1872.

In 1873 he published in four volumes the twelfth edition of *Kent's Commentaries*, with elaborate notes. From 1870 to 1873 he was editor of *The American Law Review*, Vols. V., VI., and VII., and wrote for this review the following articles: (1) "Codes, and the Arrangement of the Law"; (2) "Ultra Vires"; (3) "Misunderstandings of the Civil Law"; (4) "Grain Elevators"; (5) "Arrangements of the Law: II., Privity"; (6) "The Theory of Torts"; (7) "Primitive Notions in Modern Law" (two articles); (8) "Possession"; (9) "Common Carriers and the Common Law"; (10) "Trespass and Negligence"; and many shorter articles. An essay by him on "Early English Equity" may be found in *The English Law Quarterly Review*, April, 1885; two articles on "Agency" in *The Harvard Law Review*, March and April, 1891; "Privilege, Malice, and Intent," *Harvard Law Review*, May, 1894; "Executors," *Harvard Law Review*, May, 1895; address by, on "Boston Law School," *Harvard Law Review* and Scotch *Juridical Review*, April, 1897; "The Theory of Legal Interpretation," *Harvard Law Review*, February, 1899; "Law in Science and Science in Law," address before New York State Bar Association, *Harvard Law Review*, March, 1899. A volume of his speeches was published by Little, Brown & Co. in 1891. In the winter of 1880 he delivered a series of lectures on the Common Law, in Boston—one of the Lowell Institute courses. He published a volume upon the same subject, 1881, which was characterised as "the most original work of legal speculation which has appeared in English since the publication of Sir Henry Maine's *Ancient Law*." It has been translated into Italian.

Mr. Holmes was appointed to a new professorship in the Harvard Law School in 1882, but he had barely entered upon his duties there when (December 8th) Governor Long appointed him an associate justice of the Supreme Court, in place of Judge Otis P. Lord. He was appointed Chief Justice of the same Court, August 2nd, 1899. He is a member of the Massachusetts Historical Society, and was a Fellow of the American Academy. It may be mentioned that at the same time that his father was receiving D.C.L. from Oxford (in 1886) he was receiving the degree of LL.D. from Yale.

THE ENGLISH LAW OF NATIONALITY AND NATURALISATION.

[*Contributed by* EDWARD LOUIS DE HART, ESQ., M.A., LL.B.]

Natural-Born Subjects at Common Law.—The Common Law of England. under the influence of feudalism, made the national character of any person depend, generally speaking, on the place of his birth, not on his parentage, The rule of the Common Law is thus stated in the Report of the Royal Commission of 1868 on the laws of naturalisation and allegiance :

> All persons, of whatever parentage, born within the dominions and allegiance of the Crown are by the Common Law natural-born British subjects ; all persons, on the other hand, of whatever parentage, born beyond its dominions and out of its allegiance, were by the Common Law regarded as aliens.

This definition of natural-born subjects is correct, though incomplete, if the term "dominions and allegiance of the Crown" be understood to mean the dominions and allegiance of the Sovereign in a personal sense. Thus a Scotsman born after the accession of James VI. to the Crown of England, and before the union, was not an alien in England[1] ; and while the Crowns of the United Kingdom and of Hanover were vested in the same person, every Hanoverian was in law a British subject.[2]

In the case of protected territories there may possibly be a difficulty in determining whether the territory forms part of the dominions of the Crown. The fact that a protectorate exists is perhaps not sufficient to prove that the territory is British. The question may depend on the extent of the powers and jurisdiction exercised by the Crown, whether directly or mediately through a chartered corporation. In the *Jameson* case it was necessary to prove that an offence under the Foreign Enlistment Act had been committed in Her Majesty's dominions. The Lord Chief Justice, after reading a number of Orders in Council and Proclamations to the jury, left to them the question whether the Crown did in fact exercise dominion and sovereignty at Pitsani, the place from which one of the expeditions started.

[1] *Calvin's* Case, 7 Co. 1.

[2] See the judgment of the Court in the Stepney Election Petition Case, *Isaacson* v *Durant*, 17 Q.B.D. 54.

Every person born on a British ship on the high seas in the allegiance of the Crown is at Common Law a British subject.[1] A British ship on the high seas has often been described as British territory, a figure of speech which embodies the principle that "by the received law of every nation a ship on the high seas carries its nationality and the law of its own nation with it."[2] Whether mere birth on a British ship in foreign waters confers the right of British nationality is a point on which there is no actual decision. It is, however, clear that the Admiralty jurisdiction extends over British vessels in the tidal navigable waters of foreign States below bridges,[3] not only in respect of the persons belonging to the ship, but also in respect of other persons on board.[4] A ship so situated has been likened to a floating island, where the authority and protection of the British law prevail.[5]

"The true principle," says Lord Coleridge, "is that a person who comes on board a British ship where English law is reigning places himself under the protection of the British flag, and as a correlative, if he thus becomes entitled to our law's protection, he becomes amenable to its jurisdiction."[6]

These cases afford strong grounds for the belief that birth on a British ship in foreign waters within the Admiralty jurisdiction confers British nationality. Where, on the other hand, the jurisdiction and the protection of the law do not extend to all persons on board a British ship, a person born on the ship cannot, it is submitted, be a British subject by virtue of the Common Law rule. A ship in foreign parts, when in dock, in a part of a harbour where the tide does not ebb and flow, or in a river above locks or bridges, is not within British jurisdiction.[7] Nor apparently can this jurisdiction extend to an artificial channel, unless perhaps it be a tidal waterway where great ships go. Thus it may be that birth on a British ship in the Elbe and in the North Sea Canal will have opposite results as regards national status.

A curious question might arise as to the nationality of a person born on a foreign ship on the open sea within three miles of the coasts of the British dominions. Whether these waters are actually British territory, or whether in such parts of the sea there is merely a limited right sanctioned by International Law to exercise jurisdiction for certain purposes, is a point which in one case was exhaustively discussed by fourteen learned judges.[8] Unfortunately there was a hopeless conflict of opinion among them; and the point is not settled by the Territorial Waters Act, 1878, which was the out-

[1] *Marshall* v. *Murgatroyd*, L.R. 6 Q.B. 31.
[2] Per *Cockburn, C.J.*, *R.* v. *Keyn*, 2 Ex. D. 63, 161.
[3] *R.* v. *Anderson*, L.R. 1 C.C.R. 161.
[4] *R.* v. *Carr*, 10 Q.B.D. 76.
[5] Per *Byles, J.*, L.R. 1 C.C.R., at p. 168; per *Blackburn, J.*, *ibid.*, at pp. 163, 169.
[6] 10 Q.B.D., p. 85.
[7] *Thomas* v. *Lane*, 2 Sumner 1; per *Blackburn, J.*, L.R. 1 C.C.R. 164.
[8] *R.* v. *Keyn*, L.R. 2 Ex. 63.

come of the decision in that case. Assuming the very doubtful proposition that this part of the sea is British territory to be correct, a distinction may possibly be drawn between a ship that is either entering or leaving a British port and a ship which is merely passing through British waters. Every ship, it is admitted, has a right to navigate peaceably on any part of the high seas; and it may therefore be argued that those on board a passing ship have not placed themselves within the allegiance of the Crown. But if the waters in question are truly part of the British dominions, I find it difficult to resist the conclusion that every one born in them on a ship over which British jurisdiction can be exercised is a British subject. Whatever the law may be, there will probably be a consensus of opinion that the child of an alien born on a foreign ship should have no right to claim British nationality because the ship was at the time of the child's birth sailing within three miles of the British coast.

There are three exceptional cases in which persons born in British territory are not natural-born subjects. One is that of the children of foreign sovereigns. A foreign sovereign owes no obedience to the Crown. "Though the king be in a foreign kingdom, yet he is in law a king there."[1] His child therefore is not deemed to be born in the allegiance of the Crown. Some writers on International Law do not allow that a foreign sovereign can claim immunity from the local jurisdiction when he is travelling *incognito*; but there is no English authority for this distinction, which would have very inconvenient results. A sovereign's suite share his immunities. Therefore, although the point is nowhere referred to, it seems clear that the child of an alien member of the suite, born on British soil while the parents are attached to the sovereign's person, is not a British subject.

The second case is that of the children of foreign ambassadors or other diplomatic agents accredited to the Crown. They are excepted, says Sir Alexander Cockburn,[2] because their fathers carry their own nationality with them. It would be better to say "because the ambassador who represents his sovereign does not (like other aliens when in the realm) owe obedience to the Crown." The *attachés* and other members of a foreign mission share the ambassador's privileges, as perhaps also do the servants of the embassy. The child of an alien member of an embassy ought, therefore, clearly to be considered an alien.

The immunities of a diplomatic agent, it is said, are extended to his family living with him.[3] When the wife of an ambassador is living apart from her husband, she may be said to be living in the obedience and protection of the Crown; and her child born under these circumstances is perhaps a British subject.

There is no reason to suppose that the exception would apply to the child of a British subject who is a member of a foreign legation. Even if

[1] 7 Co. 156. [2] *Nationality*, p. 7. [3] Hall, *International Law*, p. 184.

the Courts in certain cases decline to exercise jurisdiction over the parent, he still owes allegiance to the Crown.[1] Nor does the exception seem applicable to the child, born here, of a diplomatic agent accredited to a foreign State. The father does not represent his sovereign in this country, and consequently does owe temporary allegiance to the Crown.[2]

The third case is that of the children of alien enemies born during a hostile occupation of British territory:

> If enemies should come into any of the king's dominions and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the king, though he be born within his dominions, for that he was not born under the king's legiance or obedience.[3]

By parity of reason the child of an alien enemy, born on a captured British ship in the possession of a prize crew, would not be born in the allegiance of the Crown.

I apprehend that the rule can be stated more widely than on the authority of the dictum in *Calvin's* case it is usually stated. Presumably an alien friend does not, on coming into British territory during its hostile occupation, owe temporary allegiance to the Crown, and his child born there is not, it is submitted, a British subject. To take an example suggested by recent events: if a German had gone to Glencoe during its occupation by the Boers, his child born at Glencoe would not be a British subject, though Glencoe is in Natal.

Some of the vague expressions used by writers on International Law as to the exterritoriality of ships of war suggest the conclusion that a person born on a foreign public vessel in a British port is not born in the allegiance of the Crown. There is much uncertainty with regard to jurisdiction over a ship of war.[4] The ship itself, notwithstanding a dictum of Sir Robert Phillimore's in the *Charkieh*,[5] is probably not liable to an action *in rem*.[6] And, speaking generally, a ship of war is by the practice of nations exempt from the local jurisdiction, but it is at the same time under an obligation to respect the local laws. Three of the Royal Commissioners of 1876, Sir Robert Phillimore, Sir M. Bernard, and Sir Henry Maine, considered that the captain of a foreign ship of war and those under his command are not amenable to the local jurisdiction. Sir Alexander Cockburn rigorously maintained the contrary. There is no decision on the point; and it is with much doubt that I have formed the opinion that a person born on a foreign public vessel may at Common Law be a natural-born English subject.

[1] Wheaton, *International Law*, 3rd English ed., p. 223.

[2] Dicey, *Conflict of Laws*, p. 177.

[3] *Calvin's* Case, 7 Co. 18.

[4] See the Report of the Royal Commission of 1876 on Fugitive Slaves, in which the matter is discussed.

[5] L.R. 4 A. & E., at p. 93.

[6] See the American case, *Schooner Exchange* v. *M'Fadden*, 7 Cranch 116.

The general rule of the Common Law is that persons born out of the dominions of the Crown are born out of its allegiance.

"This maxim of the law," says Blackstone, "proceeded upon the general principle that every man owes natural allegiance where he is born, and cannot owe two such allegiances or serve two masters at once. Yet children of ambassadors born abroad were always held to be natural-born subjects, for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent, so with regard to the son also, he was held by a kind of *postliminium* to be born under the King of England's allegiance, represented by his father the ambassador."[1]

The statement in *Calvin's* case,[2] that this rule only applied to the children of ambassadors whose wives were Englishwomen, may be disregarded. Even if correct it is immaterial, now that by Statute the national character of a husband determines that of his wife. The children of *attachés* and other members of British legations (themselves British subjects) are no doubt in the same position as the children of the ambassadors. The child is probably not a natural-born subject under this rule when born in a State other than that to which the ambassador is accredited.

The children of the king have always been considered an exception to the rule. An ambassador's privileges are possessed by him as the representative of his sovereign, and the rule as to an ambassador's children applies *à fortiori* to those of the sovereign himself. In 1343 the well-known declaration of the Parliament was made, that the children of the king born abroad could bear the inheritance.[3] The declaration was repeated in the recital of the Act 25 Edw. III., St. 1.

In *De Geer* v. *Stone*[4] Mr. Justice Kay held that the rule as to the nationality of the children of British ambassadors abroad does not extend to the children born in foreign parts of military officers in the service of the Crown. The cases are not analogous, for the rule in the case of an ambassador's children depends probably on the fact that the father represents the sovereign.[5] In *De Geer* v. *Stone* the child was born in the territory of an ally, and it may be asked whether, if it had been born during a hostile occupation of the enemy's territory, the result would not have been different. The answer is, I think, that the only distinction known to the Common Law is between British and foreign territory, and that a mere military occupation of the latter does not change its character. The question has but little practical importance, in consequence of legislation which now will be noticed. Cases in which British nationality will be claimed, as in *De Geer* v. *Stone*, for three generations born abroad, are not likely to occur often.

[1] *Bl. Com.*, vol. i., p. 373.

[2] 7 Co. 18.

[3] *Parliament Roll*, 17th Edw. III., set out in Mr. Abbot's *Memorandum* annexed to the Report of the Royal Commission of 1868; also cited 22 Ch. D. 245.

[4] 22 Ch. D. 243.

[5] See *per* Sir Robert Phillimore in the *Charkieh*, L.R. 4 A. & E., at p. 88.

Natural-born Subjects by Statute.—The Statutes which have conferred the status of a natural-born subject upon persons born out of the territory can be briefly mentioned. 25 Edw. III., St. 1, made all children born beyond the sea whose fathers and mothers were at the time of their birth "at the faith and legiance" of the king capable of inheriting. This Statute was construed to confer this right on the children of English fathers and foreign mothers. By 7 Anne, c. 5, the children of natural-born subjects born out of the allegiance of the Crown are made natural-born subjects for all purposes whatever. This Statute was explained by 4 Geo. II., c. 21, to relate to children whose *fathers* are, at the time of the children's birth, natural-born subjects of the Crown. The Act of Geo. II. (s. 2), expressly withholds the right of British nationality from the child when the father has been attainted of treason, or cannot return to the United Kingdom except by license without incurring the penalties of treason or felony, or is at the time of the child's birth in the actual service of a foreign enemy. Attainders were abolished in 1870, and the first and second exceptions have now no importance. By 13 Geo. III., c. 21, s. 1, all persons born out of the legiance of the Crown are natural-born subjects, whose fathers are by virtue of 4 Geo. II., c. 21, natural-born subjects. In 4 Geo. II., c. 21, it is stated that the father must be a natural-born subject at the time of the child's birth.[1] Clearly, if at this time the father has ceased to be a British subject the child is not a natural-born subject. This was expressly decided in *Doe d. Thomas* v. *Acklam*.[2] Therefore, as a British subject who becomes naturalised in a foreign country now loses his British nationality, a child of his born abroad after such naturalisation is not a natural-born subject.

The words "at the time of the birth of such children" are not to be found in 13 Geo. III., c. 21. The Act requires that the father shall be "entitled to all the rights and privileges of natural-born subjects." It can scarcely be doubted that this proviso relates to the time of the child's birth, so that no one born abroad can be a natural-born subject by virtue of either of these Acts, unless the father is still a British subject when the child is born. A posthumous child will, no doubt, be deemed to have been born at the time of the father's death.

Under these Acts the status of a natural-born subject cannot be obtained through the mother. Their effect is, shortly, that the children and the grandchildren on the son's side of every man who by the Common Law is a natural-born subject are themselves natural-born subjects, wherever they may have been born. The status of a natural-born British subject conferred by these Acts is merely a personal one; it is not made transmissible to descendants.[3] Therefore, in general, when three generations have been

[1] A posthumous child is, no doubt, in the same position as if it had been born during the life of the father.

[2] 2 B. & C. 779.

[3] *De Geer* v. *Stone*, 22 C.D. 243.

born abroad, the third generation cannot be natural-born subjects. As an illegitimate child is in law *nullius filius*, he is not within 4 Geo. II., c. 2, or 13 Geo. III., c. 21. Even his legitimation by the subsequent marriage of his parents does not bring him within these Acts.[1]

Many foreign countries deal more generously with illegitimate children. Thus the illegitimate child of a Portuguese mother, born abroad, may elect for Portuguese nationality; and by the French law such a child may, if recognised by either parent, acquire his or her national status.

The Naturalisation Act, 1870, s. 7, gives to a naturalised British subject all the rights and privileges in the United Kingdom of a natural-born subject. The question has arisen whether by reason of this enactment the children and grandchildren, born abroad, of a naturalised subject are natural-born subjects under the Acts of 4 Geo. II. and 13 Geo. III.[2] In the Court of Appeal two of the judges gave no opinion on the point. Lord Justice Cotton thought, but did not find it necessary to decide, that the child of a naturalised subject, born abroad, is not a natural-born subject. His reason was that the privilege given by the Acts of Geo. II. and 13 Geo. III. is the privilege of the child, not the privilege of the father. This is the construction of these Acts adopted in *Fitch* v. *Weber*,[3] though the point decided in that case was a different one. It follows that if a naturalised British subject goes to live abroad, and there has children, though he may remain a British subject, these children will not be British subjects unless they afterwards during infancy reside with him in the United Kingdom.[4]

Expatriation.—By the Common Law no British subject could voluntarily renounce his allegiance and nationality. In this sense British nationality was, as it has been expressed, indelible. But by the Common Law a native of British territory which has received a grant of independence, or has been ceded to a foreign power, does in general lose his British nationality if he remains domiciled in the territory when it ceases to be part of the dominions of the Crown.[5] There may, however, be a treaty stipulation that he can elect to retain his British status, as was agreed when Heligoland was ceded to Germany in 1890. Mr. Westlake states the rule widely, as applying to all British subjects domiciled in the ceded territory,[6] but it may be doubted whether the status of British subjects who are not natives is affected by a cession. Generally speaking, a native of ceded territory can by leaving it with the intention of remaining a British subject retain his national status.[7]

On the dissolution of the personal union which existed between the United Kingdom and Hanover when the Crowns of both were held by the

[1] *Shedden* v. *Patrick*, 1 Macq. 535.
[2] *In re Bourgeoise*, 41 Ch. D. 210.
[3] 6 Hare 51.
[4] Naturalisation Act, 1870, s. 10 (5).
[5] *Doe d. Thomas* v. *Acklam*, 2 B. & C. 779; *Jephson* v. *Reira*, 3 Knapp 130.
[6] Private International Law, s. 298.
[7] *Doe d. Auchmunty* v. *Mulcaster*, 5 B. & C. 771; and see *In re Bruce*, 2 C. & J. 436.

same sovereign, the subjects of the King of Hanover ceased to be British subjects.[1]

Of the inconvenient results which sometimes followed from the doctrine that allegiance cannot be renounced it is at present unnecessary to speak. The Naturalisation Act, 1870, completely altered the law in this respect. It provided (s. 6) that every British subject in a foreign State, who not being under any disability voluntarily becomes naturalised there, ceases to be a British subject; s. 8 (1) that a married woman shall be deemed to be a subject of the State of which her husband is, for the time being, a subject; and s. 8 (2) that every child of a British subject (father or widowed mother) who during infancy has become resident in the country where the parent has become naturalised, and has by the law of that country also become naturalised there, ceases to be a British subject.

The Naturalisation Act also enables any person who is a natural-born subject, both of this and of another State, to make a declaration of alienage, if of full age and under no disability; and thereupon he ceases to be a British subject.

The rule of the Common Law was that marriage did not alter the national status of a woman, whether she was the British wife of an alien or an alien married to a British husband.[2] This rule has been entirely abrogated by s. 8 (1). The effect of s. 8 (1), as the late Mr. Hall pointed out,[3] is that if an Englishwoman marries the subject of a State the law of which does not confer his national character upon her, she ceases to have any national status. The laws of most States certainly attribute to the wife the national character of the husband; but in one country, at any rate—*viz.* the Argentine Republic—marriage with a subject does not naturalise the wife.

The civil codes of most foreign countries have provided against a loss of national status in such a case. Art. 19 of the French Code Civil, for instance, is as follows:

> A Frenchwoman who marries an alien follows the nationality of her husband, unless her marriage does not confer his nationality upon her, in which event she remains French.

The rule that a married woman takes the national character of her husband is unqualified. Therefore, if an Englishwoman marries a subject of a foreign State resident in England, though they continue to reside here, she ceases to be a British subject. In this respect the law of the United States is different.[4]

Mr. Hall was of opinion that when an Englishwoman marries an alien who has no national status, she does not lose her British nationality.[5]

[1] *Isaacson* v. *Durant*, 17 Q.B.D. 647.
[2] Cockburn, *Nationality*, p. 11.
[3] *Foreign Jurisdiction*, p. 49.
[4] *Comitis* v. *Parkerson*, 56 Fed. R. 556.
[5] *Foreign Jurisdiction*, p. 50.

S. 8 (1) of the Naturalisation Act was probably intended to place the wife, as regards national status, in the same position as her husband. Yet when there is no foreign State of which he is a subject at the time of marriage, s. 8 (1) may be construed as being inoperative. If a woman should marry a native of a wholly uncivilised country, she would probably, according to Mr. Hall's view, also not lose her nationality. Such a country, he argues, is not a State. The term "State," he says, applies only to permanently established independent communities, formed with political objects, possessing a definite political organisation, and guided by a sense of moral obligation towards other communities.[1]

Resumption of British Nationality.—Having enabled natural-born British subjects to renounce their allegiance, the Naturalisation Act provides for the resumption, by them, of their British nationality. The drafting of s. 8 by which this is effected is somewhat peculiar. The section runs thus: "A natural-born British subject who has become an alien in pursuance of this Act, and is in this Act referred to as a statutory alien, may" apply for a certificate of readmission to British nationality. The only natural-born subject who is referred to in the Act as a statutory alien is a widow who became an alien by her marriage. Therefore, if these words just quoted are to be construed in their ordinary sense, a widow so circumstanced is the only natural-born subject who can resume British nationality. It is, however, clearly shown, by the remainder of s. 8 and by s. 10 (4), that this is not the proper construction. S. 10 (4), for instance, deals with the case of a child whose father has resumed British nationality. S. 8 obviously means that every natural-born subject who has become an alien under this Act may be described as a statutory alien, and may under certain circumstances resume his nationality. For this purpose he must, by s. 8, perform the same conditions as an alien who wishes to become naturalised. He must, therefore, within a limited time (eight years under the existing regulations) have either resided five years in the United Kingdom or have served under the Crown for the same time, and must intend to continue this residence or service. The granting of the certificate is discretionary.

In foreign countries a subject who has lost his status through naturalisation elsewhere can usually resume his national character as soon as he returns with the intention of residing.

The period of five years seems an unduly long one, especially in the case of persons who in childhood became naturalised in a foreign State by reason of the naturalisation of a parent. In fact, it would be more just in such a case of involuntary expatriation to allow the child to resume his British nationality without any qualifying period, if within a limited time after attaining his majority he returns to the kingdom with the intention of residing.

[1] *Foreign Jurisdiction*, p. 130.

A widow being a natural-born British subject, who became an alien by her marriage, is expressly declared to be a statutory alien (s. 10 [2]). She cannot, therefore, resume British nationality until after five years' residence. In this respect foreign States are usually more liberal. Thus, when a Frenchwoman's marriage is dissolved by the death of her husband, or by divorce, she recovers her French nationality "with the authorisation of the Government, provided she resides in France or returns declaring that she intends to remain there."[1] A similar provision exists in most of the other foreign codes.

The status of a British subject married to a foreigner and afterwards divorced is not expressly dealt with in the Act. S. 10 (1) only says that "a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject." There is no express declaration, as in the case of a widow, that a divorced woman is a statutory alien. I have, however, already given my reasons for the conclusion that every natural-born subject who has become an alien in pursuance of the Act is a "statutory alien," whether expressly referred to as such or not. If this be so, it follows that the divorced woman remains an alien until she obtains a certificate of readmission to British nationality after fulfilling the conditions set out in s. 8.

By s. 10 (4):

> Where the father, or the mother, being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother shall be deemed to have resumed the position of a British subject to all intents.

The word "resumed" causes much difficulty. A person can only resume, in the ordinary sense of the word, a status which he has lost. If the natural-born subject has become naturalised elsewhere, or has made a declaration of alienage, his children subsequently born abroad are not natural-born subjects. Are they "deemed to have resumed" the British nationality which they never possessed, by residing with the parent in the British dominions? Perhaps, as Mr. Dicey suggests,[2] the word "deemed" implies that they are to be legally treated as if they had resumed British nationality. Mr. Hall, on the other hand, was of opinion that such a construction is not possible, so that, according to his view, the provision only operates in favour of an infant who was born a British subject, and ceased to be one by the act of his parent.[3]

I think on the whole that the construction suggested by Mr. Dicey is the correct one, and that the words "deemed to have resumed" should be read as if they meant "shall be deemed to have been formerly a British subject and to have resumed the position of one."

[1] *Code Civil*, Art. 19. [2] *Conflict of Laws*, p. 745. [3] *Foreign Jurisdiction*, p. 53.

That this construction is not altogether consistent with the wording of the section must be admitted. On the other hand, Mr. Hall's view does not give full effect to the words "every child." It makes them equivalent to "every child who was a natural-born British subject." If Mr. Hall was right, the remarkable result follows that, although when an alien by birth becomes naturalised in the United Kingdom, his children who become resident with him are naturalised with him, yet when a statutory alien regains his British nationality, his alien-born child remains an alien under precisely similar circumstances. It may safely be assumed that the legislature did not desire to place the children of statutory aliens in a less favourable situation than the children of aliens by birth. If the construction favoured by Mr. Dicey be the proper one, the further question arises, What is the status of the child who "resumes" British nationality? When the father obtains a certificate of readmission to British nationality, he is no doubt restored to the status of a natural-born subject. If the child was born a British subject, the result must be the same. But it is improbable that the Act would be held to do more than confer naturalisation on an alien-born child. If the words of the section had been "every child . . . shall be deemed to have resumed the position of a British subject or to have become a naturalised British subject," the law on this point would have been placed on a clear and satisfactory basis.

The use of the term "has become resident" in this sub-section and in the provision of s. 8 (2), relating to the children of British subjects naturalised abroad, has been adversely criticised. Mr. Dicey says that the expression is "deplorably vague." Its vagueness may, however, be thought a merit. What constitutes residence is a question of fact which may depend on a number of circumstances. The time spent in the country is only one factor. Thus, a child may spend most of the year in a school in one country, and yet may truly be said to be resident with its parents in another. Each case must be considered on its particular facts; and no definition of residence could be framed which would be a satisfactory test in all. Whether the question of residence be for the Courts or for the legal advisers of the Crown, it will be easier for them to come to a just conclusion when they are not fettered by any hard-and-fast definition.

The provision "every child who during infancy has become resident in the British dominions with such father or mother shall be deemed to have resumed the position of a British subject" is not altogether free from ambiguity in another respect. The child may have resided with the parent before the latter's resumption of British nationality, and have ceased so to reside, or he may be residing with the parent at the time, or he may only come into residence afterwards. The language of the clause is, however, perfectly general, and therefore it seems that residence with the parent at any time, whether before or after the parent regains his British status, is sufficient to make the provision applicable.

Mr. Dicey asks if "during infancy" means until the period of infancy has expired.[1] There seems to be no good reason for adopting such a forced construction of the words. The change of the term "has become resident during infancy" into "is resident on attaining his majority" is not required by the context.

Denization.—Denization is defined by Sir Alexander Cockburn as naturalisation conferred by the sovereign by virtue of the prerogative. The practice of conferring the status of a British subject upon an alien by making him a denizen is one of considerable antiquity. The right of creating denizens is exercised by the Crown by letters patent. Denization does not enable either the denizen or his children born before his denization to inherit real property.[2] This restriction is now, of course, without any importance, as the Naturalisation Act, 1870, has given aliens the same rights in the United Kingdom as natural-born subjects in respect of such property.

Denization is inferior to naturalisation under the present law, in that by 12 & 13 Wm. III., c. 2, s. 3, a denizen, except he be born of English parents, cannot be a privy councillor or a member of either House of Parliament, or hold any office of trust, or receive a grant of lands from the Crown. The only reason why denization is now of any value is that it enables the Crown to grant the status of a British subject to a foreigner who is not qualified by residence or service under the Crown to become naturalised; for there is no restriction upon the right to create denizens.

Naturalisation.—Naturalisation, unless denization is also understood by the term, can only be obtained under the Naturalisation Act of 1870, or by a special Act of Parliament.

Formerly aliens becoming naturalised were excluded by 12 Wm. III., c. 2, and 1 Geo. I., c. 4, from Parliament or the Privy Council, or offices of trust, or from taking a grant of land from the Crown. These provisions were repealed in 1844 by 7 & 8 Vict., c. 66, naturalisation under which did not, however, confer the right to sit in Parliament or become a privy councillor, or any right specially reserved in the certificate of naturalisation. 7 & 8 Vict., c. 66, was repealed by the present Naturalisation Act (that of 1870, 33 Vict., c. 14), which provides (s. 7) that an alien to whom a certificate of naturalisation is granted is entitled in the United Kingdom to all political and other rights of a natural-born subject.

A declaration follows that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining naturalisation, be deemed to be a British subject unless he has ceased to be a subject of that State by law or by reason of a treaty. It seems to follow by implication that, in every other State and in the Colonies, he has the status of a British subject. As by s. 16 the right of the Colonies to confer

[1] *Conflict of Laws*, p. 192.

[2] Chitty, *Commercial Law*, vol. i., No. 5, p. 151; Mr. Abbot's *Memorandum*, p. 8.

naturalisation is recognised, it may be argued that naturalisation in the United Kingdom is not intended to have effect in a colony. The validity of such naturalisation in a colony is, however, not inconsistent with the right of the colony to grant naturalisation within its limits.

It has been suggested that if an alien, having become naturalised elsewhere, afterwards becomes naturalised in the United Kingdom, this proviso does not apply to the State in which he was born, that not being "the foreign State of which he was a subject previously to obtaining a certificate of naturalisation." It is by no means clear that this is the proper construction of the Act: "previously to" may mean more than "at the time of" naturalisation; but if the Act had said "a foreign State" instead of "the foreign State," no doubt could have arisen as to its meaning.

In order to obtain naturalisation under the Act of 1870 an alien must (1) within a prescribed period (under the present regulations, eight years) have resided in the United Kingdom or been in the service of the Crown for five years; (2) intend, when naturalised, either to reside in the United Kingdom or to serve under the Crown (s. 7). Therefore an alien who is qualified by residence, but who intends to remove to any colony or other possession of the Crown, cannot be naturalised under this Act unless he is in, or is about to enter, the service of the Crown. It is probable that neither the Isle of Man nor the Channel Islands are part of the United Kingdom within the meaning of the Act, and that residence in one of them does therefore not count as part of the qualifying period of five years.

Naturalisation under the Act is conferred by the certificate of a Secretary of State, which does not take effect until the oath of allegiance has been taken. The Secretary of State has absolute discretion to grant or refuse a certificate, and is not bound to give any reason for his decision.

By s. 10 (5), when the father or the mother being a widow has become naturalised in the United Kingdom, every child who has during infancy become resident with the parent in any part of the United Kingdom is deemed to be a naturalised British subject. The rule is, therefore, not the same as that which the Act has created in the converse case of a British parent becoming naturalised abroad. In that case, by s. 10 (3), the naturalisation of the parent deprives the child of his British nationality when the latter has during infancy become resident in the foreign country —*i.e.* not necessarily resident with the parent. But he only loses his British nationality when by reason of his residence in the foreign country he becomes naturalised there.

The language of s. 10 (5) is perfectly general, and therefore it seems that every child of a naturalised British subject becomes a naturalised subject by residing at any time during infancy with the parent in the kingdom. Thus, when a naturalised subject has a child born to him in a foreign country, the child is no doubt an alien, but by becoming resident

with the parent in the kingdom, on this construction of s. 10 (5) he becomes naturalised. If this be not the proper construction, the Act is obviously defective in this respect.

The Naturalisation Act, 1895, has amended s. 10 (5) by providing that the residence of a child of a naturalised British subject with his father, while in the service of the Crown abroad, has the same effect to naturalise the child as residence with him in the United Kingdom. As the mother is not mentioned, residence with a widowed mother in the service of the Crown out of the United Kingdom does not naturalise the child.

The general enactment as to the status of a married woman (s. 10 [1]) shows that the naturalisation of the husband affects that of the wife, whether she resides with him or not.

As s. 6 provides that any British subject who, when in a foreign State and not under any disability, voluntarily becomes naturalised there ceases to be a British subject, this provision applies to a naturalised British subject who becomes naturalised elsewhere. There is in s. 3 another provision by which a naturalised British subject can divest himself in certain cases of his British character without becoming naturalised abroad. For this purpose (1) a convention must have been made between the Crown and the State of which he was previously a subject allowing him to renounce British nationality, and (2) he must make declaration of alienage.

The Naturalisation Act is silent as to the status of an alien woman who has married a British subject after his death or the dissolution of the marriage by divorce. It merely states, as we have seen (s. 10 [1]) that a married woman shall be deemed to be a subject of the State of which her husband is a subject. The Act declares that a natural-born British subject, who has become an alien in consequence of her marriage, remains an alien after her husband's death (s. 10 [2]). It may be argued that this express declaration shows that s. 10 (1) by itself was not considered to change the wife's national status permanently. On the whole, however, it seems that as the Act contains no clause which expressly deprives a widow of the status of a naturalised British subject, she does not lose that status; but the point is not free from doubt. The result, if this be not the correct view, would be that if the foreign widow be resident in the United Kingdom after her British husband's death, she would usually have no nationality whatever; for the laws of most foreign States do not allow a female subject who has lost her national status by marriage to resume it unless she be resident in their dominions.

The Italian Civil Code says specifically (Art. 9) that the foreign wife of an Italian subject retains Italian nationality during her widowhood.

Colonial Naturalisation.—The right of the Colonies and other British possessions to legislate with respect to naturalisation is recognised by the Naturalisation Act. S. 16 declares that

> All Laws, Statutes, and Ordinances which may be duly made by the legislature

of any British possession for imparting to any person the privileges, or any of the privileges, of naturalisation, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law.

The Act does not recognise that naturalisation in any colony gives the status of a British subject out of the territory of the colony; and therefore if a person naturalised in a colony takes up his residence in the United Kingdom, he must remain an alien in the eye of the law for five years, even if he have enjoyed the rights of a British subject in the colony for fifty.

In the various colonies different views have naturally prevailed as to the facilities which ought to be given to aliens to obtain naturalisation. The desire to attract immigrants is of course not equally strong in all, the quality of the alien population may differ greatly. Consequently the Colonial laws show a great diversity as to the conditions under which naturalisation is granted. In some colonies no definite period of residence is required—*e.g.* in New Zealand and Cape Colony. In South Australia a residence of only six months is exacted. Further, although the absence of a probationary period really makes the provision unnecessary, the laws of these three colonies enact that previous naturalisation ("elsewhere," Cape of Good Hope, Act No. 2 of 1883, ss. 4, 5; "in another colony," South Australia, Act No. 5 of 1864, s. 11; "in the United Kingdom or another colony," New Zealand, Act No. 10 of 1880, s. 7) may be recognised as effective in the colony. A fact worth noticing is that in 1896 the Legislature of New Zealand passed a law prohibiting the naturalisation of Chinese settlers.

Although naturalisation in a colony has according to law no effect or status out of the colony, the person naturalised is not refused the protection of the Crown in foreign countries. The passport which is given to him differs, however, in form from the ordinary Foreign Office passport, in that it only describes him as naturalised in a certain colony.

One result of the limited effect given to Colonial naturalisation, pointed out by Mr. Hall, is that in Oriental countries the naturalised person has no right as a British subject to the protection of the consular jurisdiction. The grievance is, however, more apparent than real; for he may be given the same advantage by being made a protected person.

Naturalisation is in this country regarded as a privilege, to be neither churlishly withheld nor indiscriminately granted. In the present state of Colonial legislation it may not be advisable to allow naturalisation in any colony to give the status of a British subject in the United Kingdom; but it seems to me that the law would be greatly improved if the Secretary of State had a discretionary power to give a certificate of naturalisation at once to an alien who has been naturalised in a colony and has taken up his abode in the United Kingdom. Residence in a colony might also be allowed to count as part of the qualifying period of five years; but such a concession would not be without its dangers. Enquiries as to the antecedents of the applicant

could not be made so easily as when he had resided in the United Kingdom.

A more satisfactory alteration of the law could be effected by a scheme which has been suggested under the title of Imperial Naturalisation. This scheme would allow the Colonies as heretofore to grant naturalisation within their limits on such terms as they think fit. At the same time it would create a new kind of naturalisation, to be obtained in every part of the Empire on compliance with certain uniform conditions, the same in substance as are required in the United Kingdom. The naturalisation obtained under this scheme, truly called Imperial Naturalisation, would confer the status of a British subject in every part of the Empire.

MOHAMMEDAN LAW IN INDIA: ITS ORIGIN AND GROWTH.

[*Contributed by* Sir Raymond West, K.C.I.E.]

Historical Basis of the Administration of Mohammedan Law in British India.—By Warren Hastings' famous "Plan" of 1772 a Court of Diwáni Adálat, or Civil Judicature, was set up in each Collectorate, presided over by the Collector as Diván of the Emperor. Criminal Courts were established at the same time, in which the decision of the Kázi or Mufti was made subject to the supervision of the Collector. The chief Courts were the Diwáni Sadr Adálat, composed of the Governor-General and Council for civil causes, and the Nizámat Sadr Adálat for criminal cases. The latter was presided over by a Darogah Adálat, appointed by the Názim of Bengal, but superintended by the Governor-General and Council, in order to check any violations of natural justice through the advice of the Mohammedan law officers, based on the provisions of their law as to evidence and retaliation. Capital sentences at this stage were sent to the Názim for his fiat.

Under this "Plan" Mohammedans and Hindus were given the benefit of their own laws in suits regarding inheritance, marriage, caste, and other religious usages and institutions. By the Regulating Act, 13 Geo. III., c. 63, the Governor-General and Council were empowered to legislate for Fort William and its dependencies in Bengal, and under this authority, after several intermediate regulations, Impey's Code was promulgated in 1781. By this the functions of the civil Judge were wholly severed from those of the Collector. The law to be administered remained as before; and by the Statute 21 Geo. III., c. 70, s. 21, the superintending Court, the Sadr Diwána Adálat, was made a Court of Record. In 1782 the Governor-General and Council, who had handed over the superintendence of this Court to a single judge,[1] had to resume it under orders from the Court of Directors. In the meantime, by Regulations of 1780 and 1781, it had been enacted that the "Law of the Korán" should be administered to Mohammedans in suits relating to "inheritance and succession, marriage and caste, and other religious usages or institutions." This was repealed by s. 15 of Reg. IV. of the Cornwallis Code of 1793.

In 1784 the Statute 24 Geo. III., c. 25, directed that permanent

[1] *I.e.* to Sir Elijah Impey.

rules should be settled "according to the laws and constitution of India (as to Zamindars, etc.), by which their tributes, rents, and services should be rendered and paid."

With regard to the Supreme Court established at Calcutta under 13 Geo. III., c. 63, it was enacted by 21 Geo. III., c. 70, that suits should, in the case of Mohammedan Daíiis, be determined by Mohammedan Law in cases relating to inheritance and also to contracts. Provision was made also for preserving the authority, under Mohammedan Law, of the fathers and masters of families, and for freeing them from criminal liability for acts affecting members of their families consistent with the law of caste. In the subsequent Statutes for establishing Recorders' Courts and Supreme Courts at Madras and Bombay, similar provisions were made, and were fortified by a direction that the rules of the Courts should be framed with due respect to the religious laws and usages of the natives.

The Charters of the present High Courts, under the Statute 24 & 25 Vict., c. 104, preserve to them the jurisdiction previously exercised by the Supreme Courts. The Statute 24 & 25 Vict., c. 67, gives to the Governor-General in Council full power of legislation for British India; and in the exercise of this power, and of that simultaneously conferred on the local councils, the Hindu and Mohammedan Laws have been maintained or declared operative in the several provinces of India, with certain variations of expression, as noted in my introductory lecture on Hindu Law. The variations consist generally in the greater or less weight allowed to local custom in competition with the general provisions of the Hindu and Mohammedan Laws. In case of difference the customary law generally prevails; but the precise terms of the jurisdictional laws should be studied as set forth for each province in Sir Roland Wilson's Digest. Rather important breaches have been made by legislation in the Mohammedan Law by Act 21 of 1850, which frees an apostate from forfeiture of his property; and by the Contract Act 9 of 1872, which applies to transactions, in many cases, rules differing from those of the Mohammedan Law. Majority is fixed by Act 9 of 1875, at an age (18) different from that fixed by the Mohammedan Law. The duties of guardians are defined and modified by Act 8 of 1890, but without radical alteration of their relation to their wards and the estate. The extent to which the Probate and Administration Act operates on executors who do and who do not obtain probate has not been completely settled. The Succession Certificate Act 7 of 1889 greatly enlarges the powers of relatives and persons interested as to the estate of a deceased, if they arm themselves with a certificate. Kázis abolished by Act 11 of 1864 may now be appointed for certain Executive duties under Act 12 of 1880.

Sources of Mohammedan Law.—The sources of the Mohammedan Law are—

(1) The word of God revealed in the Korán.

(2) The acts and words of Mohammed.

(3) A decision of agreement, as to some point mooted, by the companions of Mohammed, their disciples or the pupils of these.

(4) Inferences from the indications afforded by any of the foregoing drawn by recognised Mujtahids.

The lawyer or judge who is called in to decide a point in a controversy is not at liberty to construe the original sources (1) and (2) according to his own discretion. He is bound by the interpretations, by the rules and jural method, accepted by the school to which he belongs, or to which the party to be affected belongs. He must allow due weight to authoritative treatises of the same school; and in India he must be governed by the decisions on similar points of the Judicial Committee of the Privy Council and the High Courts. The weight due to precedents is fully recognised by the Mohammedan Law; and many collections of precedents exist, especially the *Fatáwa-ul-Alamgiri*, compiled by order of the Emperor Aurungzeb. The decisions of the British Courts must be allowed at least equal force, in order to prevent confusion and uncertainty.

The Korán.—The early life of Mohammed is sketched in Sir Roland Wilson's *Introduction to the Study of Mohammedan Law*. I shall purposely avoid the matters which are there treated in detail, and shall call attention to the sources, authorities, and science of the Mohammedan Law as viewed by the Mohammedans themselves, whom it binds as a part of their religion.

The much greater part of the Korán was dictated by Mohammed after his withdrawal to Medina. He used from time to time to fall into an ecstasy, on recovering from which he had a message to dictate which had been brought to him by the Angel Gabriel. Many otherwise insoluble difficulties were thus disposed of. The passages delivered by the Prophet were committed to memory, in some instances reduced to writing, by his disciples. Mohammed himself appears to have exacted scrupulous accuracy in the record of his inspirations. He dismissed Mouavia, it is said, from the office of secretary on account of an erroneous entry, and replaced him by Zaid ibn Thabit, to whom the literary perfection of the Korán is largely due. After Mohammed's death there was an evident danger of the text being lost or corrupted. This was prevented by a careful collation made by Zaid, and a commission of those who knew all or most of the Korán by heart. Great pains were taken with the work. The MS. was handed to the Khalifa Abu Bakr, from whom it passed to Omar, and after him, to his daughter Hafza—a widow of the Prophet. She placed it on her husband's tomb. The Kaliph Othman afterwards made a copy, which he deposited in the great mosque at Damascus, where it remained, until destroyed, along with the mosque, some few years ago, by fire. Two other copies were made from Zaid's MS., and from these all the existing copies of the

Korán have been derived. They are almost absolutely free from variation, except in a few places where the omission of the vowel-points has left an opening for supplying these in different ways, with a consequent difference of sense.

According to Mohammedan belief, the messages delivered to the Prophet by the Angel Gabriel were by him repeated word for word. But his conduct also was equally regulated by Divine control: hence the acts and forbearances preserved by tradition—what Mohammed said, and even what he allowed to be said and done—all afford grounds for inferences of inspiration. As he could not err, his decision on any subject, whether express or implied, has to be received as conclusive and binding as a command of heaven. He did not himself pretend to an exemption from error in judgment and conduct, but the reverence of his disciples soon invested him with a semi-Divine infallibility.

Traditional Authority.—The word "Sunna" (pl. "Sunnat") signifies manifestation or visible conduct. The casual acts and events even of the Prophet's domestic life have been made the basis for doctrines of momentous importance. The sayings and doings of Mohammed having a sacred authority were religiously preserved by tradition. It happened, also, that they were greatly multiplied and varied as time went on. After some generations they were reduced to writing by several jurisconsults; and six of the collections thus made are generally accepted as authentic.[1] Of these six, the works of Bukhari and of Hafiz Muslim Nissaburi, as being the most ancient, command the most confidence; yet even these were not compiled until two centuries after Mohammed's death. Each of them comprises about seven thousand three hundred separate traditions, together with the *isuaad*, or specification, of the links of tradition by which each was traced up to a companion of the Prophet. When at an earlier period the great jurists Abu Hanifa and his successors came on the scene, they generally found a *hadis* ready at hand to support the conclusion on any point in controversy which was conformable to reason and to the ethical system of the Korán. They must have been cheered in their labours by such a *hadis* as this: "When the Most High desires to show favour to one of His slaves, He makes him a lawyer"; or this: "The prayers of a lawyer are mightier against Satan than those of a thousand laymen." It is certain that Mohammed attached a high importance to the correct administration of justice according to the law, which he regarded as a precious boon of God to man. He stamped a sacro-sanctity upon his legislation, as of Divine ordinance, which in after ages has sometimes proved a stay and sometimes a fetter.

Mohammed's own Legislation.—Mohammed's first essay in legislation was in his agreement with the envoys who invited him to Medina. They swore

[1] The Shiahs reject the traditions received through the first three Khaliphas. They accept the example of their Twelve Imáms as itself a source of law, not merely as an authentication of the traditions of the Prophet.

on behalf of their fellow-citizens to worship one God, to abstain from theft, infanticide, adultery and fornication, and degrading insults to women. We may learn from this enumeration what forms of immorality were most flagrant, and how great a step Mohammed at once took in advance. After his installation at Medina he organised public and private worship, and established the Zakát, or alms-tribute, as an institution divinely commanded. The contests in which he was engaged necessitated his regulating the disposal of booty and prisoners of war and of conquered and ceded lands. During his ten years of rule he had to decide a multitude of civil disputes. Direct revelation from time to time came to his assistance. Its inspirations are enshrined in the Korán. His actions and words, equally authoritative when clearly established, constitute the Sunnat. From these two sources the whole Mohammedan religious and jural system has been evolved. Just before his death Mohammed recited God's message to himself: "This day I have completed your religion and perfected my favour for you. I am satisfied with you as regards the faith." And in his final address to the assembled believers, after specific exhortations to good living, he concluded: "I have revealed all. I leave you a law which will for ever preserve you from error if you steadfastly adhere to it—a clear and positive law, the book of God, and the example (practice) of His prophet." As all the requisite guidance for human life was declared to be contained within these limits, it would be sacrilege to contradict their contents or to seek illumination from alien sources. Yet the authority of these last words itself rests on oral tradition.

Mohammed's Successors.—The four immediate successors of Mohammed (called Ráshid ad Din[1]) followed his example in disposing, as chief judges, of a multitude of litigious cases. Omar, as well as Abu Baku, used to assemble for conference, on such occasions, a council of the faithful, by whom the question was debated with reference to the words and acts of the Prophet as reported by those who remembered them. The *ijmaa*, or concurrence of opinion thus arrived at, became a further fountain of jurisprudence and one of great importance. It was by such means that Omar obtained a ratification of his determination not to distribute all the lands of Syria as spoil to his victorious soldiers, but to leave them in the hands of the Christian occupants, subject to a Kharáj exceeding the tithe payable by Moslems, and dedicated to the uses of Islám.

The practice of obtaining enlightenment as to the law by means of *ijmaa* continued for three generations. The councils were composed of the Prophet's companions, of their disciples, and of the followers of these. At a later stage their moral authority could not be very weighty, and the Prophet himself had said that the "felicitous hour" belonged to these three generations.

[1] The Shiahs regard Ali, the cousin and son-in-law of Mohammed, as his first lawful successor, both as Imám and as Khalipha. After him his posterity. In India the Shiahs prevailed at Bijapur and Golconda, and recently in Oudh.

The councils thus assembled were no doubt influenced in their views by considerations of general utility; but they did not venture to rest any conclusion on a merely rational basis, much less one opposed to a Koránic text. Thus when exile as well as the bastinado was found too severe a penalty for fornication, a council assembled by Omar relied, for its abrogation, on a direction that the laws should be modified according to the needs of times and circumstances. Had the process of legislation by *ijmaa* continued, this latitudinarian principle might have annulled or reversed the chief behests of the Korán.

Amongst the fiercest early antagonists of Mohammed were the Abu Sofian clan of the Khoresshite tribe, to which his own clan, of the Abu Hashim, belonged. The two clans were hereditary rivals; and Mohammed's greatest perils, after he had established his ascendency at Medina, arose from the attacks of his own tribesmen. They were eventually converted, but more perhaps through policy than conviction; and the accession to power of the first Abu Sufianite, in the person of Mouaviah, was attended with a slackening of religious zeal which continued throughout the rule of the Ommeyad Dynasty. During this period the Mohammedan Law derived much from foreign sources, but in a form which would have tended to disintegrate it as a homogeneous system, had it not been for the subsequent religious reaction, under the Abbasides, representatives of Mohammed's own clan, and the uprise at a critical time of the legislative genius of Abu Hanifa.

The Moslems and Land Tenure.—From the time of the conquest of Syria and Irak, for a century or more the Moslems appear to have paid but little attention to the development of their law on Islamic lines. For the Moslems, it is true, there can be no right except what is right according to revelation; but then the Ommeyad sovereigns ruling at Damascus especially the first, Mouaviah, had but little of the true Mohammedan spirit. They ruled over a country in which the Roman Law had been completely established, and where indeed there were great schools of law. For the land tenures and the transactions of the Syrian community the meagre legislation of the Arabs afforded almost no rules. The higher civilisation, therefore, in spite of the theoretic rejection by the Mohammedan Law of any foreign ingredient, imposed itself in a great measure on the lower in the field of law, as well as of administration. In the period preceding the rise of the Abbasides—750 A.D.—the Mohammedan Law became infiltrated with many notions, derived from the Civil Law, which it has ever since retained, though mostly in a modified form. For a period of about ninety years there was a complete cessation not only of original legislation, but of theoretic and doctrinal development of Islamic jural principles. The change that was coming over the Moslems in Syria was highly distasteful to the more rigid believers in Arabia, and under the Abbasides there was a considerable reaction towards strictly Mohammedan feeling and principles, governed by

the sacred texts and traditions. The royal fountain of legislation had run dry with the death of the fourth rightly guided Kalipha ; but under Abu Jafar-al-Mansur a new creative energy was manifested, and continued to operate for about a century, but especially for the fifty years or so down to the decease of Harun al Raschid. It took the form of doctrinal exposition, and the seat of superior Moslem legislation has from that time been transferred from the palace to the mosque and law school.

Mohammedan Jurists.—The first and chief agent in this revolution was a man of genius named Abu Hanifa,[1] commonly called by Musalman writers the Imámi Azim. He was a doctor well versed in the Greek learning of his time, as well as in the Korán, and the mixed doctrines derived from it and from alien sources. The task he set himself was that of "Islámising" the jural institutions of the Mohammedans, of founding them on a purely Mohammedan basis. He began by framing a philosophy of jural duties and relations which, however suggested by the actual state of things, and in its conclusions conforming to accepted notions, was logically deduced from the sacred sources, the Korán and the Sunnat. As a means of ascertaining the true scope and significance of these, he made use of the Ijmaa and the traditions. Having thus settled the doctrinal and ethical basis, he proceeded, by a free use of *qiyás*, or analogical reasoning, to build up a superstructure of practical law. Every principle, every rule, however minute, was referred directly or remotely to the sacred sources, appreciated by reference to the occasion and circumstances in which they originated. His decisions were generally recorded. From this time forward it has been recognised that, though a true Moslem may submit to a non-Islamic law through constraint, yet no such law has a moral claim on his obedience, nor can he obey it of choice without a risk of eternal perdition. And the sacred law for a Moslem is not the authoritative pronouncement of the prince or the judge, but the exposition given by the *ulama* or recognised jurisprudents according to the principles of the school to which they belong.

The Mohammedan Law is a particular phase of the Mohammedan religion. Like the other parts of that religion, it is regarded as sacred and supernal. Its sense, in the more abstruse and complex cases, has to be accepted from certain recognised *mujtahids* as expositors. These differ for the different sects amongst the Sunnis ; but the adherents of one of the principal sects is bound by the doctrine and jural method of its founder. After the death of Hanbal, A.D. 856,[2] the *ijtahid—i.e.*, the intense meditative energy by which the four great *mujtahids* became virtual legislators—ceased, or at least ceased to be recognised as creative and authoritative.[3] Subsequent doctors of perhaps equal ability conceived the idea of founding new schools ;

[1] Born A.D. 699 ; died A.D. 767.

[2] A.H. 241.

[3] Mujtahids are of three classes. Those of Class I cannot be questioned. See Morley I., Introd. 238.

but finding this impracticable, they were able to cover the failure of their projects by supposed intimations of the divine disapproval of any additions to the legal edifice, save in the way of elaboration of the plans already outlined. Within this boundary, as defined by the founder, and in accordance with his system, the Mohammedan jurist has a discretion in dealing with new cases as they arise analogous to that exercised by the judges in England. The difference between the two is this, that the judgment of the English Law Court becomes itself a part of the national legislation, while amongst the Mohammedans no extension or modification of principles is allowed beyond the point reached by the great masters. The original sources may be used according to a mufti's ability,[1] but for the method pursued by him in any solution of a legal problem, he must rest on a principle or a precedent approved by a master—*i.e.* a *mujtahid* of the first or second class.

It was inevitable that in such conferences as those of the ijmai *umat*, convened by the early Khaliphas, there should frequently be a dialectic treatment of indications primarily pointing different ways. It was equally inevitable, where no text or example precisely in point could be found, that the *ijmaa* should be framed according to some analogy. This involved an application of reasoning which, limited to the original sacred materials, subsequent jurists of the Hanafi school thought equally open to themselves. Thus brandy was pronounced a forbidden beverage by analogy to wine, the use of which was prohibited by Mohammed. The Prophet himself had approved of the ijtihad, or constructive effort, by which one of his officers said he proposed to deal with cases for which there was no rule provided. Abu Hanifa therefore had a good precedent for the application of *qiyás* to the many cases really unprovided for in the meagre legislation of the Korán. The danger attending this process was that of so rationalising the law, that it would eventually be brought into discord with the Korán and the Sunnat, or at least stand quite apart from them.

Abu Yusuf, the first eminent disciple of Abu Hanifa, showed a tendency to explain away the narrower texts, or to ignore them; but the puritan reaction was meanwhile gathering force in Arabia. Malik and Shafi put a curb on ratiocination as a source of law. Their schools abjured the plastic liberality of the Hanafis. Hanbal was a hide-bound reactionary who reproached himself for having ever departed a hair's breadth from the sacred texts. The wide acceptance of such teachings reacted even on the Hanafi school, and checked a development which in the ninth century had placed the Mohammedan Law, in many ways, far in advance of the Christian laws of the same time.

Abu Hanifa, though so great as a lawyer, wrote but little. His work might have perished with him, but for his having disciples of a merit inferior only to his own. Two of them, Abu Yusuf and Abu Mohammed,

[1] Sir Morley I., Introd. 240.

are constantly cited along with him as the greatest authorities on Mohammedan Law. The former was raised by Al-Mansur to the dignity of Qazi al quzát. He first reduced the special doctrines of his master to a methodical and popular form, in which they were diffused over the Mohammedan world. He wrote also a fundamental treatise on the Kharáj, and he is supposed to have collaborated in some of the works of his fellow-disciple Abu Mohammed. The latter may be regarded as the editor, if not the author, of the Sunni Mohammedan Corpus Juris. He was the friend and companion of the Khalipha Harun al Raschid. He composed the "Great Collection" and the "Small Collection," the former containing a full discussion of 1528 legal questions pronounced on by Abu Hanifa, and the latter a summary. To these he added a supplement. In a third work, called the *Mabsut*, he analysed the theory of the law as conceived by his school, and illustrated it by practical applications. This was followed by a treatise on the law of war, and the disposal of conquered territory. He compiled the laws and regulations framed by Harun al Raschid, with his aid, for the government of several conquered provinces. An estrangement having grown up between Yusuf and Mohammed, the doctrines of the two afterwards diverged on some points to a serious extent. When that is found to be the case the decision rests with Abu Hanifa wherever his opinion can be ascertained. When the two disciples concur they are allowed to balance or even outweigh their master.

The edifice raised by Abu Hanifa and his disciples has been extended by their successors, but never substantially changed. Their authority, even that of the disciples, is so great that they are deemed *mujtahidini bi cheri—i.e.* jurisconsults in legislation. No one in after ages has been allowed by their school to be a mujtahid of the first rank. This is the school which has prevailed amongst the Sunnis of India and of Turkey; and its doctrines are, therefore, those which most call for our close study. The heads of the other three great Sunni schools, recognised also as mujtahids of the first rank, are the Imami Malik, who died in A.H. 179,[1] the Imami Shafi, deceased A.H. 204,[2] and Hanbal, who died A.H. 241.[3] Malik's doctrines are received along the north coast of Africa. Shafi's tenets have gained some acceptance in India, as well as in Arabia and Egypt; and in Kurdistan and Java they are dominant, as well as on the Persian frontier of Turkey. Shafi was a pupil of the Imami Mohammed, as the latter was himself for a time of Imami Malik. Hanbal's peculiarity was a rigid literal interpretation of the texts, as if by a reaction from the teaching of Yusuf. His system prevails in Morocco and partly in Algiers. It has adherents in Java also, but virtually none in India or Turkey. The four founders of schools are in substantial agreement as to the fundamentals of their faith and law; but there are some material differences among them both as to religious practices

[1] Born A.D. 713, died A.D. 795.
[2] Born A.D. 767, died A.D. 819.
[3] Born A.D. 780, died A.D. 855.

and as to the rules of judicial decision. Shafi alone of the three later Imámis manifests any pronounced opposition to Abu Hanifa. The views of all four are embodied in Codes, the authority of which, however, rests entirely on the reputation of the founders of the schools.

The authority gained by the great mujtahids for learned lawyers as such gave weight and importance to a whole library of law books written in after times. These writings have been classed as

(1) Notes on the Korán.
(2) Anecdotes of the Prophet.
(3) Collections of the "Responsa Prudentam."
(4) Treatises on the theory of the Law.
(5) Treatises on the practical application of the Law.

Of Class (1) there are six works of commanding importance. The *Kashshaf* and the *Anwár at Tanzil* are of the first authority. One of the most respected by the Hanafis is that of Abu Mansur al Maturidi.

The collections of Hadis in Class (2) are very numerous. There are six great Sahibs or collections of Sunnat. The one by Al Bukhari, who died A.H. 256, is the most esteemed. It contains 7395 authenticated traditions. Another great collection is that called the *Sahib Muslim*, by Muslim, who died A.H. 261, A.D. 874.

The collections of fatáwa, or opinions on litigious cases, forming Class 3 are pretty numerous, but only those of comparatively modern date are now much referred to, as these alone bear on cases arising in actual practice. The *Fatáwa al Alangiri* is one of the greatest and most esteemed of these compilations. It was prepared by a commission appointed by the Emperor Aurungzeb, and is esteemed as much in Turkey as in India. An earlier work much quoted is the *Fatáwa Kazi Khan.*

There is an idea pretty widely entertained that the "door of effort in legislation" was closed (*i.e.* that the quasi inspiration through which sound jural doctrines could be produced, ceased) about the time of Abd ul Rahiman in Spain (A.D. 912—961). All that is clear is that at this time the Imami Gazáli abandoned his intention to found a new school, and that Abdullah ibn Massud, who died A.H. 747,[1] gave up a similar project in obedience to an intimation conveyed to him in a dream. But on the lines traced by the four great mujtahids there has never been a cessation of the delivery of opinions dealing with cases as they arose.

The theory of the law is by Moslem lawyers considered a matter of great importance, and accordingly there are many works of Class (4).[2] The Shafeitos claim for their founder the credit of having first treated the theory of the law in a systematic way; but Abu Hanifa preceded him at least in oral teaching. He wrote too a work on the Metaphysics of Theology, a subject closely connected with Law in the Mohammedan system. The

[1] A.D. 1347.

[2] The Shiahs have been hardly less prolific than the Sunnis in works of this class.

establishment of the Islamic foundations was an object with all the great mujtahids; and there is evidence that Abu Yusuf, A.D. 731–98, wrote a treatise on "Usul," though it is not preserved, as well as a practical work on the duties of Kazi. Abu Hanifa's philosophic method is constantly followed in the voluminous writings of his other disciple, Abu Mohammed.[1] The most famous treatise of this class is the Fahr al Islam, or "Splendour of Islam," by Pezdavi, who died A.H. 481. In recent times the study of the "Usul" has been rather neglected by Mohammedan lawyers, though very necessary in order that the new rules required by change of circumstances should be moulded into harmony with the general Mohammedan system.

(5) The first great works of the fifth class are the *Jami ul Kabir*, and an abridgment called the *Jami ul Sagir* of the Imam Mohamed. These are based on the responses given by Abu Hanifa, and are of the highest authority. The *Makhtasar al Kuduri* is so esteemed as to be commonly cited as "Al Kitab," = The book (Al Kuduri died A.D. 1036). It is the basis of the popular work called the *Hidayah*. The great modern work called the *Multaqa al Abhar*, or "Confluence of the Seas" (A.D. 1549) was compiled chiefly from the *Vigaya*, written by Taju Sharia, and commented by Sadir Sharia in the fourteenth century A.D., and three other similar treatises. But the author made use also of the *Hidaya* ("Way of Salvation") of Barhanudin al Marginani, so called from his birthplace, Marginán in Fargána. This author died in A.H. 593.[2] His work is much relied on in India. There are several commentaries on it, especially the *Kifaya*, A.D. 1346; and a translation of it, through the Persian, was made by Hamilton under the direction of Warren Hastings.[3] The Multaqa frequently cites also the *Mukhtassar* ("Abridgment") of Abu Hasan Ahmad Quduri, already referred to. The *Multaqa al Abhár* was condensed, rearranged, and translated by D'Ohsson in his "Tableau de l'Empire Ottoman." Its author was Ibrahim Halebi, who died A.H. 956 (*circa* 1550). A great modern work on the Applied Law (Furu) is the *Rad ul Mukhtar* ("Choice Pearl") of Ibu Abadin, who died A.H. 1298 (*circa* 1881). This is in the form of a commentary on a work of about a century earlier, and affords a good picture of the most recent practical developments of the Mohammedan Law. For fundamental principles it goes back to the works of Imami Mohammed.[4] In the other Sunni schools recourse is had by all later lawyers to the doctrines of Malik, Shafi, and Hanbal. In the philosophy of the law no innovation is tolerated on the principles laid down by the four great masters, though within the outlines traced by them a complete freedom is allowed to Mohammedan jurists in the way of deduction, comparison, and analogical reasoning.

As the Chief Kazis and Muftis of a Mohammedan realm must be

[1] A.D. 749—802. [2] A.D. 1196.

[3] The subject of Inheritance is unfortunately omitted.

[4] On the doctrine of Inheritance the leading authority is the Sirajiyah. The chief commentary is the Sharifiyah (A.D. 1411). These were translated by Sir W. Jones.

appointed by the sovereign, it has until lately been easy for a Sultan or a Great Moghal to man the highest posts in the religious hierarchy so as to obtain a sacred sanction for his own policy and his excesses. It was a common thing in former days to banish a Chief Mufti from Constantinople; and Akbar in India condescended to oppress a recalcitrant ulema. The consequence was that the fountains of justice were corrupted, and the ruler was set free from the only restraint that he was bound to recognise. In the early part of the last century the Sultan could obtain from the Chief Mufti an opinion that it was lawful to exterminate Shias, and that a peace concluded with them might be broken at the first convenient moment. In Oudh the appointment of a Shia Chief Kazi was the sign and the means of a general conversion of the people from the Sunni to the Shia faith professed by the King.

The Mohammedan philosophy divides things knowable under the heads of sciences of reason and sciences of revelation.[1] Law belongs to the latter class. The sciences of revelation are sciences of the sources or of the derivatives. The science of the sources deals with the Korán, including its language, and the Hadis or traditions. The sciences of the derivatives comprise theology and law, which latter is subdivided into theory (*usuli-fiqh*), and applications (*furu*). Applied law deals with the relations of living persons either to others or to persons deceased. The former embrace all transactions, the latter inheritance. There is, moreover, a group of human actions, such as prayer, fasting, alms, pilgrimage, and holy war, which are regarded as of legal obligation, and as admitting enforcement by mundane sanctions, like the duties commonly enforced by law under the Christian systems. A great part of the Moslem social and political structure is built upon the recognition of pious duties as proper to be insisted on by the sovereign. Thus the fiscal system rests in a great measure on the duty of almsgiving and the tithe; and the *jihad*, or holy war, when commanded, is a political institution of the first importance, enforced at need by an earthly, as well as by the strongest religious sanction.[2] Austin's theory of the law as a general command of a human superior does not square with Moslem notions. According to them, jural obligation rests on the will of God, manifested directly or indirectly by revelation. The command of the sovereign is binding because, and in so far as, it gives effect to God's will; if it contravenes God's will, as declared in the Sharan, it is to be resisted. "Obey me as I shall obey the Lord and His apostle!" So exclaimed Abu Bakr when elected Kaliph; and the sacred law has always been held supreme, even over the sovereign, whom otherwise it makes absolute.

[1] Morley I., Introd. 246.

[2] The public taxes are classed as "hukuki shariyé" and "rusm"—*i.e.* lawful changes and administrative cesses, besides which there are always "aváni" or exactions. The capitation, Kharáj, and usuri are all, as "hukuki," included sometimes in the term "Kharáj."

The reception of any one of the great creeds of mankind has always profoundly affected the moral character of its disciples. The new standpoints taken up for viewing the relations of man to man, as well as of man to God, have thus in every instance greatly modified the material conditions of human existence. New duties and obligations becoming recognised, along with new prospects and hopes, have led to material changes in the balance of motives, in the habits and the social organisation of those subjected to the new spiritual influence which dwarfs all others. Thus in the sphere of law the triumph of Christianity, without directly subverting the Roman law, infiltrated it with principles which made the Code of Justinian widely different in spirit and total effect from the Institutes of Gaius. The family, the social structure, were de-Romanised and reformed on a Christian basis of natural relations and Christian benevolence. Yet Christ disavowed any mission as a political reformer, as a lawyer or judge. It was only through the quiet but complete change of the moral basis of some, the most important, of human relations that the law was drawn by an irresistible force into a general conformity with the new and nobler faith. In the great departments of public law, proprietary rights, inheritance, and contracts, Christianity left the whole field open as before to the operation of principles based simply on reason and a sense of general utility. Meanwhile the Christian family relations, loyalty, truth, and honesty in transactions, have been surrounded with sacred sanctions, developed at some points into legal safeguards.

Islamism aimed from the first and in the largest sense at being a universal and a missionary religion. It paid respect to the Mosaic institutions and to the Christian morality; but it aimed at constituting a universal society on a new basis of revelation. This may not perhaps have been a clearly conceived purpose of Mohammed, but it almost immediately became that of his successors. It regards every truth of science, philosophy, and administration as embraced within religious truth, and subject to sound religious dogma. It endeavours to provide for the whole scheme of human relations; and so includes a complete system of law, at least in outline. Within this are embraced many duties, such as almsgiving, which Christian legislation leaves to be enforced only by the social or the moral sanction; and the strictly legal duties are enumerated and enforced with a detail which, regard being had to the sacred character of the law, makes expansion and adaptation in some cases extremely difficult. Thus the prohibition against taking interest on loans has created endless embarrassment in the field of commercial law. No ingenuity has sufficed quite to evade it; and as the making of profits on transactions is approved, many subtle distinctions have had to be invented to keep such profits in cases of credit dealings out of the forbidden category. The business of banking is one that a conscientious Musalman can hardly pursue, nor can he keep a reserve of money available for occasions of profitable use without losing such gain

as a Hindu or Christian would make in the meantime. The disadvantage thus caused has been most injurious to Mohammedans as merchants: as capitalists they hardly exist; the machinery of credit in Mahommedan countries is almost wholly in the hands of aliens, with conspicuously evil results. The long-continued inculcation of an unsound economic principle, under the guise of a religious precept, and the habits and practices induced by it, have gradually affected even the capacity of Mohammedans for money dealings; and they are everywhere the prey of infidel usurers and of traders unhampered in the use of their capital and their financial traditions, connections, and abilities. Suleiman the Great, in his "Kanun náme," allowed interest up to 11 per cent. to be taken, as he also alleviated the punishment prescribed by the Shariya for many offences. But the Shariya nevertheless remained, and the interpretation of it could not be altered by a human decree. Thus it is that in Turkey the Greeks and Armenians thrive, while they are detested, and sometimes massacred, as at an earlier time the Jews were in England. The Mohammedan faith, wherever it has been fully received, has, partly because of its simplicity, partly because of its minute regulation of conduct, exercised a powerfully plastic influence over the believers. The original national type of character has been supplanted to a great extent by a specially Mohammedan character; and every Sunni Moslem is, in feeling and turn of mind, a compatriot of every other. He hears the same texts, utters the same prayers in the same ways, admires the same patterns of conduct, and thus by degrees become subjected to the domination of a common moral alchemy.

The centrifugal dispersive character of the Mohammedan laws of the family, and of inheritance, affords another striking instance of the powerful effect of a religious system on the social and political organisation, and on the economic condition, of a community. Four wives are allowed to the orthodox believer: he may legitimise his offspring by his house-slaves. All the sons stand on a footing of perfect equality; it is only the father's preference that can give any one precedence, even in a succession to the throne. Hence the slaughter of brothers as a necessary security for a newly-installed sultan, a process facilitated by the absolute power assigned by the law to the head of the state so long as he supports the *shariat* or sacred ordinances and conforms to them.[1] Political progress, even political stability, is hardly possible under such a system.

Amongst the great men of a lower grade the necessary splitting up of the patrimony at each descent so as to give their prescribed aliquot portions to a number of heirs, co-operates with other causes to produce recurring poverty, and to prevent the growth, in any Mohammedan country, of a territorial aristocracy, which might serve as a bulwark against the sovereign's tyranny.

[1] Mohammed II. cites in his "Kanun-name" the opinion of the Ulema that the Sultan might lawfully murder his brothers, and adds "Let my descendants fare accordingly."—Finlay, *History of Greece*, v. 32.

The land in a conquered country once made *waqf*, or quasi-*waqf*, and dedicated to the uses of charity and the support of Islám, may indeed be assigned, by way of fief or *jaghir*, for the maintenance of pious or public services; but any such alienation is in principle specific and temporary. Where the soil has once been suffered to remain in the hands of the conquered, subject to the "*Kharáj*," it retains that character ever afterwards, even when transferred to a Moslem,[1] and when the cause for a temporary alienation of such lands, or, rather, of the State's Kharáj—*i.e.*, the land-tax to an individual—ceases, the estate may be resumed. Hence the apparent confiscation, often noted by travellers, of a nobleman's estate on his death. It was, in fact, an estate on conditions, and only for his life; and all it produced was affected with an obligation, requiring it to be expended for the designated purpose,[2] though on the feudatory's death it was usual for the sovereign to allow a partial enjoyment of his emoluments to his family for one or two generations. This resumption was so frequent that it became a pattern, it may be feared, in some cases, for others in which an estate which was really property was taken by the sovereign at the owner's death; and then for a claim of the sovereign as the universal heir of landholders. Such confiscations had no ground in the Mohammedan Law, and they were never practised, save in pure caprice, in the case of estates left by traders and agriculturists; but the fear of them was enough to make landed property precarious, as a needy or greedy monarch or satrap might at any time find an excuse for plunder.

The Mohammedan annals are indeed full of instances of vazirs and other great officers growing rich by malversation, dying by violence, and leaving a family that, through confiscation, sinks into penury and obscurity as suddenly almost as the deceased had emerged from it. Some prudent upstarts endeavoured to provide for their descendants by putting their estates into "*waqf*," with a trust for the family; but as a settlor could

[1] Confiscated and waste lands belong to the State Domain. Like those left to the former infidel proprietors, they are subjected to a Kharáj, but without a recognised right of ownership in the occupant.

[2] Amongst the Seljuk Turks hereditary fiefs appear to have been established very early. Many of these were continued by the Ottomans. Murád I. first made the hereditary military fief a regular Mohammedan institution, but still each transmission of the fief required a renewal of the grant from the Sultan. Suleiman the Magnificent legislated against unauthorised recognitions and partitions of these benefices. He was aided by the great Mufti Abu Sund, and on his death the farmáns and fatáweh were collected by Mohammedans Chalabi in a Kanun-name. From this it appears that the ordinary military grantee took the State's fiscal rights but for his life, in return for military services. He took the customary rent and cesses from the raiyats, frequently a tax in kind out of the lands included in his grant, in order to pay the charges of his office. In India an hereditary fief was hardly recognised. The holders of ancient chiefdoms in many cases accepted re-grants of them, on terms of giving a large portion of the revenues to the Mohammedan conqueror. They thus become tributary zamindars. The holder of a *timor* (*tumar*) or pecuniary grant however valuable, did not become a proprietor of the soil or even of the revenue.

thus dispose of property only in so far as it was really his own, his purpose could usually be defeated. An independent legal opinion could hardly be obtained against the Crown, owing to the dependence of the Kazis and muftis, except where some cardinal point of faith was concerned.

In Turkey the Ulema, under the regulations framed by Mohammed II., and by Suleiman the Great, were organised into a very powerful body, teaching both theology and law—law as a part of religion. They enjoyed two great privileges—freedom from taxation, and unquestioned succession. Thus, as Von Hammer points out (Bk. xxxv.), they are the sole hereditary aristocracy of the country, as in their families alone can fortunes be accumulated and transmitted without ruin from fiscal and official rapacity. No such organisation of the learned was ever, apparently, arrived at in India. The head mufti and the Kazi ul Káziat had to rely on their own reputation, and the reverence felt for their offices, in order to give effect to their fatáwah and decisions. The Ulema as a class never rose to great importance or wielded the formidable power exercised by them in Turkey. The sovereign in case of need could rely on Hindu numbers against Moslem fanaticism. With a little skill in statecraft he made both subservient to his own purposes.

The ordinary raiyat's position throughout the greater part of the Mohammedan territories was that of an occupant subject to the Kharáj imprescriptibly annexed to his holding, without the ownership which might be conceded to the conquered, subject to Kharáj and Jiziyat, but as a tenant by sufferance of the Crown, with a right ripening by time and use into a kind of possessory title. The provincial and local authorities had no right to exact more than a reasonable land-tax. An appeal lay to the sovereign if they exacted too much. Such was the theory, but in practice the limit of exaction was generally the raiyat's ability to pay, especially in India, after the farming system had been established, and Zamindars, hereditary or non-hereditary, subject themselves to arbitrary demand, were allowed to recoup themselves at the cost of the peasants.[1] Under this system, when a raiyat died, his holding fell into the domain of the State, though the usufruct would be continued to his son. If he was driven away by war or oppression, or through poverty could not cultivate his holding, in these cases too it lapsed to the State. The Mohammedan Law abhors "dead land," and if the holder of arable land does not till it, an outsider may do so. The government share of the crop is thus made available, and the intruder in return is secured in temporary possession. The joint and superior interest of the State (of Islám) cannot be displaced, and in the common case of a lapse it becomes sole ownership. Thus it was that at the time when British ascendency was established, government was the almost universal landlord of a great part of India. Private property in

[1] The position of the Bengal raiyat was by such means assimilated to that of the Egyptian fellah towards the multezim.

land could, and did, subsist in many cases, and the Mohammedan law afforded no warrant for its confiscation; but the land that could be reduced to private ownership and the means of acquiring it were very limited. Thus, too, it was that the crown lands in Turkey, at the meridian of Ottoman splendour, yielded about three-fourths of the whole revenue of the State (see Von Hammer, Bk. xxxv., vol. 6, pp. 260, 267). The soil had in most cases become forfeit by conquest, and had not been distinctly restored to private ownership subject to Kharáj. It had become domain of the State, with usufructuary rights in the occupants ripening, according to time and place, into a possessory title, subject to variable taxes, and to a free exercise of the eminent domain of government.

The general narrowness and inflexibility of the Mohammedan Law in refusing recognition to any rights and relations except such as are based on its own provisions, and therefore on the Mohammedan religion, is qualified, in practice, by the rule that questions of personal status, and those relating to the clergy of a tolerated religion, are to be governed by the religious laws of the particular community. The analogy of the Mohammedan Law itself is followed as to principle, while its particular rules are dropped. Mohammed himself directed that protected subjects should be conceded what belonged to their religion; and the law of personal status, as viewed by Moslems, falls peculiarly within this category. So, too, do the regulation of worship, and the relations between clergy and laity. Hence it was that the Sultan and the Great Moghul readily allowed the Christian bodies in their dominions their own laws as to marriage and inheritance. They went further, and allowed them to settle all civil disputes amongst themselves by their own laws and their own tribunals.[1] A similar indulgence was allowed to the Hindus in India. But once a case fell within the scope of the public law, or had to be adjudged by a Mohammedan tribunal, as always where a Mohammedan was a party, no other law was applied, or could be applied, than that which alone the Mohammedan holds binding and superior to all merely rational considerations.

In order to avoid injustice arising from this source, the several Christian Powers obtained from the Sultan of Turkey concessions called Capitulations, under which the Consular jurisdiction over their own subjects was recognised, and a right was secured of presence on the part of a Consular official at every trial by an indigenous court of a case in which a subject of the Christian State was sued or prosecuted. In recent years the Mixed Tribunals in Egypt have been set up, with cognisance of all suits between Europeans

[1] The Sultans from the time of the capture of Constantinople always used the Patriarch as an instrument of government. In the earlier times of their dominion they left much of the local administration to the Christian villagers. In India the village institutions were hardly touched by them until fiscal derangement there, as in Turkey, led to encroachments and oppressions, especially through the farming system, which caused a general disintegration.

and natives, and between Europeans of different nationalities. Codes of law have at the same time been promulgated in Turkey and Egypt based chiefly on the Code Napoléon, for the purpose of assimilating the penal law and the commercial law to those of Christian countries. These are quite different from the Kanun-name of Orkhan, Mohammed II. or Suleiman the Legislator, which was a system of administrative ordinances supplemented by penal regulations. They purport to place all subjects of the Sultan on a footing of equality as to civil rights, enforced by a set of secular tribunals (mehkemes). As the Kazis of the old school, bound to administer the *Sharaa* as interpreted by the Ulama, could not be entrusted with jurisdiction under these new laws, a separate set of Courts has been set up in each country, the procedure of which is regulated by codes likewise derived chiefly from the French. Such Mohammedans as recognise the Prophet's suggestion that new laws should be made by meditative effort, to meet new exigencies, accept the new Courts, and the modern law they administer, as having a moral as well as a legislative claim to their obedience. The Ulama look askance on these innovations. The circle of the law, they hold, was completely drawn by Mohammed: he declared that his precepts and example were enough for human guidance; any contradiction of these involves sacrilege, and no supplement can be necessary. They admit only that many principles merely indicated are susceptible of development on truly Islamic lines. Such development, they say, they would welcome. Mere interpolations from alien systems deserve in their view only the respect due to a rule of force.

MARTIAL LAW IN REBELLION.

[*Contributed by* G. G. PHILLIMORE, ESQ.]

THE fact of the proclamation of Martial Law in certain districts of Cape Colony and Natal in connection with the present war in South Africa may be thought enough to justify a brief consideration of the nature, meaning, and effect of Martial Law when proclaimed in any part of the British dominions.

Original Meaning.—The term Martial Law originally was spelt "Marshal Law," and meant the law administered in the Court of the Marshal and the Constable of England, described as "the fountain of martial law" by Coke, which was recognised by statute as early as the reign of Richard II. (end of fourteenth century), and practically ceased to exist under Henry VIII., when the office of Constable fell vacant, and was never afterwards except temporarily filled. The Act 13 Ric. II. 2 (A.D. 1389) thus describes the Court's jurisdiction:—

"To the Constable it appertaineth to have conusance of contracts and deeds of arms and of war out of the realm, and also of things that touch war within the realm which cannot be determined or discussed by the Common Law, with other usages and customs to the same matters pertaining which the other Constables have heretofore duly and reasonably used in their time, joining to the same that every plaintiff shall declare plainly in his petition afore that any man be sent for to answer thereto. And if any will complain that any plea be commenced before the Constable and Marshal that might be tried by the law of the land, the same complainant shall have a privy seal of the King without difficulty directed to the said Constable and Marshal to surcease in that plea till it be discussed by the King's Council if that matter ought and of right pertaineth to that Court, or otherwise to be tried by the Common Law of the realm of England, and also that they surcease in the meantime."

Another Act, 1 Hen. IV. 14 (1399), provides that all appeals made of things done out of the realm shall be tried and determined before the Constable and Marshal of England for the time being, and that no appeals shall be pursued in Parliament. Hale (who died in 1676), in his account of the Court's jurisdiction, says that these officers had, as regards matters of war, a judicial power over

"(1) appeals of death or murder committed beyond the sea according to the course of the civil law.

"(2) the right of prisoners taken in war; and
"(3) the offences and miscarriages of soldiers contrary to law or the rules of the army, for always preparatory to actual war the kings of this realm by the advice of the Constable and Marshal, were used to compose a book of rules and orders for the due discipline of their officers and soldiers, together with certain penalties on offenders, and this was called martial law (*Hist. Common Law*, 41).

But it must be a time of war to give exercise to their jurisdiction, for if in time of peace a commission issue to exercise Martial Law, and such commissioners condemn any of the King's subjects not being listed under the military power, this is a great misprision and an erroneous proceeding, and accordingly adjudged in the case of the Earl of Lancaster (*Pleas of Crown* i. 500). The Court proceeded according to its customs and usages, and in cases omitted, according to the Civil Law, *secundum legem armorum* (Coke, *Inst.*, Pt. iv. ch. 17). It sometimes also tried offenders by Martial Law, but only either during or not long after serious rebellion; and as regards aliens this was not disputed. Thus, when Perkin Warbeck, an alien born in Flanders, was taken prisoner in his invasion of England, it was resolved by the Justices that he could not be punished by the Common Law, but before the Constable and Marshal, who had a special commission to hear and determine the same according to Martial Law, and the sentence of that Court, that he should be drawn, hanged, and quartered, was executed upon him (7 Co. Rep. 6 a); and in Mary's reign some of those taken in Wyatt's insurrection were tried without regular process, though their leader had his trial by a jury (Hallam, *Const. Hist.* i. 326). When the Constableship fell into disuse, the jurisdiction of the Court of the Marshal was disputed, but its disciplinary power over the army in time of war was exercised by the Marshal or the general commanding, in virtue of royal commission; for the Court could be held by commission, and this was not touched by the Petition of Right (Hawkins, *Pleas of Crown* ii. 17). The Crown also claimed the right of executing Martial Law against rebels, but this was only allowed *flagrante bello*. Thus in the case of the Earl of Lancaster, who took part in a rising against Edward II., and on being taken prisoner was tried by Martial Law after the rising was suppressed, and executed at Pontefract, the proceedings were afterwards, on the petition of his son, solemnly reversed by Parliament in the first year of Edward III. as illegal; and a similar course was taken in the similar case of the Earl of Kent. Under the Tudors the claim to exercise Martial Law was, no doubt illegally, extended by the Crown in various ways. Thus Henry VII. applied it against rebels after the suppression of rebellion; Edward VI. declared that offences which were Common Law misdemeanours should be punished by it; and Mary and Elizabeth respectively proclaimed that bringing heretical books into the country, or introducing Roman bulls or traitorous works from abroad, would be dealt with by it. Elizabeth, on the petition of the City of London

during the riots there in 1596, gave a commission to Sir T. Wilford to execute Martial Law on the rioters; but no executions took place under it, and the persons arrested were tried by the ordinary courts; and probably all these proclamations were only *in terrorem*. The Stuarts claimed the exercise of Martial Law for the purposes of putting down rebellion and maintaining discipline in the army: *e.g.*, under James I., in 1624, on the occasion of the return of the army from Spain, a commission was issued to various persons, including the Lord Marshal of the army, military officers, local gentry, and townspeople at Dover, to "proceed within an assigned district according to the justice of martial law against soldiers or other dissolute persons going with them . . . committing any robberies, felonies, mutinies, or other outrages and misdemeanours, which by martial law should be punished by death in such summary course and order as is agreeable to martial law and as is usual in armies in time of war." Articles of War issued in 1625 by the Crown for the discipline of the army till it should be disbanded (which was not till 1628) made specified offences punishable by the commanding officers or the Marshal's Court, and authority was given "to any three or more of the commissioners to call a Marshal Court, and sit in commission to hear, judge, and determine any fact done by soldiers, but to have no power to put to death till they have advertised the general that shall have power of life and death for such troops as he shall command" (Clode, *Mil. Forces of Crown* i. 18); and similar commissions to the above were issued while the army was kept together, the object of which was not merely to support the discipline of the army or navy, but for the more speedy punishment of any crimes committed by offenders in the pay of the Crown and civilians associated with them. In the arguments in Parliament on the right to proclaim Martial Law, which preceded the passing of the Petition of Right, Mr. Rolls said:

"I will not trench upon this power, but upon the abuse of it. The law of the marshal is the king's law, and the common law takes notice of it, and we acknowledge it to be, but now the question is when it is to be used. The common law is the highest for the subject; every liege man inherits the law; it is the inheritance of the king and is not to be taken from him, and martial law is merely for necessity where the common law cannot take place. If the Chancery Courts and Courts of Westminster be shut up, that are the *officina justitiæ*, it is time of war, but if the Courts be open it is otherwise; yet if war be in any part of the kingdom that the sheriff cannot execute the king's writ there, there is *tempus belli*. If an enemy come into any part where the common law cannot be executed, there may martial law be executed. If a subject be taken in rebellion, if he be not slain at the time of his rebellion he is to be tried after by common law; but if an alien enemy come into the realm he cannot be executed by the common law, for he is not a liege of the king's and so is to be tried by martial."

And Coke said:

"It is time of peace when the Courts of Westminster are open, for when they are open you may have a commission of *oyer* and *terminer*. Where the common

law can determine a thing, the martial law ought not. . . . To hang a man *tempore pacis* is dangerous. I speak not of prosecution against a rebel: he may be slain in rebellion, but if he be taken he cannot be put to death by martial law" (3 Rush. Appendix 79, 80).

In 1628 the Petition of Right (3 Car. I. 1) was passed, which, after reciting the issue of such commissions as that of 1625 above, declared that they shall be revoked and none such ever again issued. In 1639, however, on the occasion of the Northern rising, the Earl Marshal, who commanded the royal forces, was given by his commission authority to execute Martial Law upon mutineers of his own army and the rebels and enemies captured. But in 1640 the lawyers and judges of the Council expressed their opinion that "Martial Law cannot be executed here in England but when an enemy is really near to an army of the King," and the general's execution of a mutineer was illegal. The House of Commons declared the Earl Marshal's Court a grievance; and in order to maintain discipline in the army, proposed that the Crown should issue a commission of *oyer* and *terminer* to the officers in the field and some gentlemen of the country for the trial of members of the King's army in pay. Both Houses were invited by the Crown to confer upon such "a plan to settle the discipline of the army as might not weaken the Petition of Right,"—with what result is unknown. They, however, had a conference as to the disbandment of the army; and the Lords urged that the general should be given power to execute Martial Law for punishing the disorders of soldiers; but the Commons would only agree to ask the King to send down a proclamation that any disobeying the lord-general or their officers should be punished severely as in contempt of the power of King and Parliament (*ibid.* i. 24). However, during the Civil War the Parliamentary army was governed by Articles of War composed by the Earl of Essex, and issued by leave of both Houses in 1642. After the Restoration commissions were issued to generals commanding the forces sent to suppress rebellion (*e.g.* Monmouth's in 1685) empowering them to execute Martial Law on mutineers of their own army and the rebels or enemies captured; and Charles II.'s Articles of War purported to give authority to administer justice to soldiers by Courts-martial, even by sentences of life and limb; but they were only to be in force during the rebellion.

In 1689, the first Mutiny Act, after a recital that "the maintenance of a standing army in time of peace without consent of Parliament is against law, and that no man might be prejudged of life or limb, or subjected to any kind of punishment within this realm by martial law," legalised for the first time the maintenance and discipline of an army in time of peace; and the Mutiny Act of 1702 (1 Anne, 16), and all its successors which continue this state of things, add the words "in peace" after "subjected" above. Thus neither the Petition of Right nor the Mutiny Acts prohibit the use of Martial Law except in time of peace (defined as above): "The particular grievances at which the Petition of Right was

levelled were only the trials under martial law of military persons or of individuals accompanying, or in some manner connected with them" (Lord Brougham, Demerara Debate, *post*).

Accordingly, until 1689 there was no difference between Martial and Military Law, both terms meaning the law applicable to soldiers in time of war; and it is in this sense that the definitions of Martial Law in the authorities of the seventeenth and eighteenth centuries must be taken. Thus Hale speaks of it as—

"in truth and reality not a law, but something indulged rather than allowed as a law. The necessity of good order and discipline in an army is that only which can give these laws countenance, and the indulged law was only to extend to members of the army or to those of the opposite army, and never was so much indulged as intended to be exercised and executed upon others. For others who had not listed under the army had no claim or reason to be tried by military constitutions applicable only to the army wherein they were part. But they were to be ordered and governed according to the laws to which they were subject, though it were time of war, and the exercise of martial law, whereby any person shall lose his life or member or liberty, may not be permitted in time of peace, when the King's Courts are open for all persons to receive justice according to the laws of the land" (*Hist. Com. Law*, 34, 42).

Comyn, *Abridgment*:

"Martial Law cannot be used in England without consent of Parliament."

And so Blackstone (1765), i. 414:

"Martial Law is built on no settled principles, but is entirely arbitrary in its decisions, and is in truth no law but something indulged rather than allowed as law, a temporary excrescence bred out of the distemper of the state, and not any part of the permanent and perpetual law of the kingdom. The necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace when the King's Courts are open for all persons to receive justice according to the law of the land."

Lord Loughborough said in 1792:

"Martial Law, as described by Hale and Blackstone, does not exist in England at all. Where it is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law merely because the decision is by a court-martial, but which has no affinity to that which was formerly attempted to be exercised here, which was contrary to the constitution, and has been for a century totally exploded," and goes on to describe Martial Law as meaning a law which claims jurisdiction over all military persons for all offences exercised by military officers (*Grant* v. *Gould*, 2 H. Bl. 69).

Modern Sense.—Since, however, the separation of Military Law from Martial Law took place, the latter term has been applied to something quite different—namely, the law of necessity promulgated by the Crown in case of domestic danger arising from foreign invasion or native insurrection to which both civilians and soldiers are equally subject, and which is enforced by military authority. The possible existence of such a state of things in

British dominions has been repeatedly recognised by statute; but it has been stoutly contested between writers on constitutional law and military law whether it is a part of our ordinary law or not.

Thus Sir James Stephen distinguishes four classes of Martial Law: "(1) the law marshal executed by the constable and marshal upon troops in actual service, and especially in foreign service; (2) the law marshal extended to times of peace upon emergencies, and for the punishment of breaches of the peace; (3) military law as stated in the annual Army Acts; (4) the common law right of the Crown and its representatives to repel force by force in case of invasion or insurrection, and to act against rebels as against invaders;" and he adds that (1) is obsolete, superseded by courts martial, (2) is illegal by the Petition of Right, but has been applied to a very different thing, namely (4). Professor Dicey says: "Martial Law, if it means the power of the Government or loyal citizens to maintain public order at whatever cost of blood or property may be necessary, is part of English law; but it is more often used for the name for the government of a country or district by military tribunals, which more or less supersede the jurisdiction of the Courts, and this, its proper sense (*i.e.* suspension of the ordinary law and the temporary government of the country or part of it by military tribunals), is unknown to English law" (*Law of Const.* 273). Lord Thring similarly says: "The proclamation of Martial Law is no more than an authoritative announcement of the existence of a state of things in which force will be used against wrongdoers for the purpose of protecting the public peace. In modern writers it is used to mean the laws of war or the exercise of force in case of rebellion" (*Official Manual of Military Law* 19). Hargrave, in an opinion given as to the legality of the trial of a civilian in Ireland by Martial Law previous to the statute allowing it of 1799, says that "before the passing of the Act it had been open to doubt whether the prerogative of claiming and exercising martial law in time of actual invasion by a foreign enemy, or in time of actual rebellion, was not merely referable to the law for governing the royal army and all connected with it (*i.e.* for governing those employed in defending the country against invasion and suppressing rebellion), and whether under martial law to try persons seized in rebellion or upon suspicion of being rebels before a court-martial constituted by the King's authority and punish them by death, or otherwise at the discretion of such a Court, was not an extension of martial law beyond its real object, and an infringement of the law of England, in a point of most serious character . . ." and adds in a note his conviction that "apart from statute this illegal right to try by martial law rebels taken in open insurrection was irreconcilable with the Petition of Right and the opinions then expressed of Coke, Rolls, Noy, Banks, and Hale" (Forsyth, *Opinions* 188-92).

On the other hand, historians such as Hume and Hallam say that there may be a Martial Law in time of insurrection or public disorder, exercised

sometimes by the Court of the Constable and Marshal (Hume, *History* v., App. 3; Hallam, *Const. History* i. 326 *ante*). Lawyers such as Finlason and Forsyth, and military lawyers such as McArthur, Clode, Hough, and Simmons, take the view that the Crown has a prerogative right to declare Martial Law and execute it in British dominions in times of necessity, such as insurrection or invasion, unaffected by the Petition of Right, which was only aimed at the suppression of Martial or Military Law in time of peace, on the ground that rebellion is war within the realm, and that therefore, in the words of Mr. Stuart Wortley in the House of Commons Committee on the Ceylon revolt in 1849, "the proclamation of Martial Law is the declaration of a state of war."

The best way of testing these two theories is to review the historical occasions on which Martial Law has been called into existence in British dominions, and the opinions then expressed by statesmen and lawyers.

Martial Law in the United Kingdom.—Instances of Martial Law up to 1689, when Military Law was finally distinguished from it, have been given above. Since that date the only time at which Martial Law has been proclaimed was in 1798 in Ireland; and it is noteworthy that no attempt was made to set it up either in the risings of 1715 and 1745 or the Gordon riots of 1780. In 1715 the King in Council issued a proclamation authorising all officers, civil and military, by force of arms if necessary, to suppress the rebellion. In 1745 all civil magistrates were charged by proclamation to do their utmost to prevent and suppress all riots, and put in execution all laws made for preventing the same. In 1780, during the Gordon riots, authority was given to the military to put down the riot without the intervention of the civil powers, but all persons arrested were, as had been publicly intimated, tried by ordinary law. In none of these was Martial Law proclaimed, although in the last at least the civil power was superseded. In 1798, on the outbreak of rebellion in the south of Ireland, proclamation was made by Order in Council to officers commanding the forces to employ them with the utmost vigour and decision for the immediate suppression of the rebellion; and this was followed by another to all general officers commanding the forces to punish all persons acting, aiding, or in any manner assisting the rebellion according to Martial Law, whether by death or otherwise, as to them should seem expedient for the suppression and punishment of rebels.

One of the Irish leaders, Wolfe Tone, was taken prisoner on board a French ship, tried by Court-martial in Dublin, and sentenced to death. The Civil Courts were still sitting there, and application was made to them for a writ of *habeas corpus*: his counsel urged that he was not a soldier in the King's service, and therefore no Court-martial could take cognisance of any crime imputed to him while the Court of King's Bench sat in the capacity of the great Criminal Court of the land. The Court granted the writ, though Tone died in prison from the effects of a self-inflicted wound; but it may be noticed that the rising had been crushed when Tone was taken.

A special statute was accordingly passed by the Irish Parliament to enable Martial Law to be in force whether the ordinary Civil Courts were open or not, which recited "the Crown's undoubted prerogative in executing Martial Law, which had so far restored the peace of the kingdom as to allow the course of the Common Law partially to take place," and contained a proviso that it did not abridge the acknowledged prerogative of the Crown for the public safety to revert to the exercise of Martial Law against open enemies or traitors (1799, 39 Geo. III. 3). But, presumably for greater security, an Act of Indemnity was afterwards passed in Ireland in respect of all acts done in enforcing the above-mentioned statute. In 1803 coercive measures again became necessary in Ireland, and the Parliament of the United Kingdom passed an Act in similar terms to the previous Irish one (43 Geo. III. 117). Mr. Pitt in introducing the Bill stated that the Bill was not to enable the Government in Ireland to declare Martial Law in districts where insurrection existed, for that power the Crown already possessed, but to . . . enable the Lord Lieutenant to order any persons taken in rebellion to be tried immediately by Court-martial, but not to supersede the Civil Courts in Ireland and to deprive subjects in civil causes of the ordinary law of the land; and that if accepted it would be followed by a Bill to suspend the *Habeas Corpus* Act in Ireland. Mr. Hargrave, in speaking of this Act, in the opinion quoted above, says that "it makes a vast difference, for it contains recitals which recognise a royal prerogative of authorising trial and punishment of rebels by Martial Law, and that he was forced to resist any contrary impressions he previously had as to the real boundary of Martial Law."

Again, in 1833 (3 & 4 Will. IV. 4), a similar Act was passed; and it has therefore been said that the Crown has now, by admission of Parliament, the undoubted right of executing Martial Law for the defeat or dispersion of armed rebels.

In the Colonies.—Whatever power the Crown possesses in this respect in the United Kingdom it possesses equally in the Colonies, whether settled or conquered; for it seems that the Petition of Right applies to both as being merely declaratory of the Common Law of England regarding the limits of the sovereign's prerogative and the subject rights (Cockburn, L.C.J., in *R.* v. *Nelson*, *post*). *Vice versâ*, whatever power in this respect the Crown has in the Colonies, except by colonial enactment, it also has in the United Kingdom.

Martial Law has been proclaimed in the Colonies in times of invasion or insurrection in the following cases: in Barbadoes in 1805 and 1816, in the latter case many rebels being sentenced to death by Court-martial; in Demerara in 1823, where the rebellion began August 18th, Martial Law was proclaimed August 19th, an amnesty was proclaimed August 22nd, and on October 13th a missionary, John Smith, was tried by a Court-martial, of which the chief justice of the colony was a member, and was sentenced

to death, but died in prison, and martial law ceased on January 15th following; in Jamaica in 1831-2, and in 1865, on which latter occasion the outbreak began October 11th. Martial Law was proclaimed in certain districts October 13th, and a civilian, Gordon, was arrested October 17th outside the proclaimed districts, taken into a proclaimed district October 20th, tried there by Court-martial and sentenced October 21st, and executed October 23rd; in Canada in 1837-8, the Montreal district of Lower Canada being placed under Martial Law; in Ceylon in 1817 and 1848, in the latter case Courts-martial sitting in the proclaimed districts and the Civil Courts elsewhere; in Cephalonia, a protected state, in 1849; in Cape Colony, in certain districts, in 1836, 1846, and 1850; and in St. Vincent in 1862, but no Courts-martial were held, the persons arrested during the period of Martial Law being tried by the Civil Courts.

The Demerara case led to an exhaustive discussion in Parliament of the nature of Martial Law, on a motion by Mr. (afterwards Lord) Brougham that "the House viewed with serious alarm and deep sorrow the violation of law and justice manifested in these unexampled proceedings." He said that since the Petition of Right no such thing as Martial Law had been recognised in this country, that Courts founded on proclamations of Martial Law were wholly unknown, and that the proclamation of Martial Law would place every one, civilian or soldier, in the situation of a soldier. But he admitted that in presence of a great emergency—*e.g.* invasion or rebellion, where there is no time for the slow and cumbrous proceedings of Civil Law—a proclamation might perhaps be justifiably issued for excluding the ordinary tribunals, and directing that offences should be tried by Military Courts, but this was only justifiable by necessity. Sir James Mackintosh said the only principle on which the law of England would tolerate what is called Martial Law is necessity: that Martial Law put in force against rebels and enemies was only a more regular and convenient mode of exercising the right to kill in war, a right originating in self-defence and limited to those cases where such killing is necessary as a means of insuring that end; put in force against rebels it can only be excused as a mode of more deliberately and equitably selecting persons from whom qnarter ought to be withheld, in a case where all have forfeited their claim to it: it was nothing more than a better regulated decimation, founded on choice instead of chance, to provide for the safety of the conquerors without the horrors of undistinguished slaughter, justifiable only where it is an act of mercy, by the law of England it could not be exercised except where the jurisdiction of the Courts of Justice is interrupted by violence. The Government admitted that Martial Law could only be justified on the ground of absolute necessity, but the motion was refused by 193 to 146 (11 *Hansard*, N.S. 968, 976).

During the Canadian rising in 1837-8, the British Law Officers advised that "the Governor of Lower Canada had the power of proclaiming in any

district in which large bodies of the inhabitants are in open rebellion, that the Executive will proceed to enforce martial law; but such proclamation conferred no power on the Governor which he would not have possessed without it, and the object of it could only be to give notice to the inhabitants of the course which the Government is obliged to adopt for the purpose of restoring tranquillity. In any district in which by reason of insurrection the ordinary course of law cannot be maintained, the Governor may without any proclamation proceed to put down the rebellion by force of arms, as in the case of a foreign invasion, and for that purpose may lawfully put to death all persons engaged in the work of resistance. The right of resorting to such an extremity is a right arising from and limited by the necessity of the case. The prerogative does not extend beyond the case of persons taken in open resistance, and with whom by reason of the suspension of the ordinary tribunals it is impossible to deal according to the regular course of justice. When the regular courts are open, so that criminals may be delivered over to them to be dealt with according to law, there is no power in the Crown to adopt any other course of proceedings; such power can only be given by the legislature (as in Ireland). The question how far martial law supersedes the ordinary tribunals can never, in our view of the case, arise: it cannot be said in strictness to supersede the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded. It can never be enforced for ordinary purposes of civil or even criminal justice, except in the latter so far as necessity arising from actual resistance compels its adoption" (Clode ii. 500).

The Ceylon rising of 1848 led to the appointment of a Committee of the House of Commons to inquire into the proceedings under Martial Law, before which the Judge Advocate General, Sir David Dundas, gave evidence; and his view of Martial Law as a law of necessity was adopted by Sir James Stephen in his opinion in the Eyre case. He stated it as his opinion that the Irish Act (39 Geo. III. 3) was "a plain recognition by Parliament of the prerogative of the Crown to declare martial law, and an assurance to the country that the Crown would always, when it has opportunity, come to Parliament for a confirmation of its authority, and then proceed according to law; but an emergency may arise where necessity is thrown absolutely on the Executive, which must decide for itself then and there upon that necessity; and if there be such a force as to set at defiance the constitutional authorities of the realm, it is the duty of the Executive, and there is royal authority to do so at home and abroad in order to put it down. . . . The proclamation of martial law is a notice to all to whom it is addressed that there is now in the land another measure of law and mode of punishment than there was before it." In the debate which took place in the House of Lords, Lord Torrington, who was Governor of the Colony at the time of the revolt, stated that he had put Martial Law in force with the advice and concurrence of the general in command of the forces and the Queen's

Advocate; that the Civil Courts were closed; that the crimes for which the rebels were punished were treason, aggravated murder, and highway robbery; that prisoners who had committed offences prior to the proclamation were tried by the Supreme Court, while those guilty of high treason and correspondence with the rebels during its continuance were shot after trial by Court-martial.

The Duke of Wellington's Definition.—The Duke of Wellington said that Martial Law was neither more nor less than the will of the general who commands the army, and was in fact no law at all; and Earl Grey agreed with him, saying that that was in accordance with the instructions he as Colonial Secretary had given to Lord Torrington, on the advice of Lord Cottenham and Lord Campbell—viz., that what is called proclaiming Martial Law is no law at all, but merely, for the sake of public safety in circumstances of great emergency, setting aside all law and acting under military powers, a proceeding which requires to be followed by an Act of Indemnity when the disturbances are at an end. A motion in the House of Commons that "the punishments inflicted during the disturbances were excessive and uncalled for" was rejected by 282 to 202 votes (Clode ii. 501).

It must be observed that the Duke of Wellington was referring to the state of law in a foreign country occupied by an invading force, which was not the case then under discussion, for the inhabitants have no legal rights against persons exercising Martial Law, and the conduct of the latter need not therefore require justification by necessity; but subject to the considerations of necessity, the will of the general does in cases of rebellion too decide what the law shall be, and how it shall be executed.

In the case of Cephalonia, in 1849, the Government refused a proposal for an inquiry by Royal Commission into the measures taken to suppress the disturbances; the facts being that Martial Law was proclaimed August 30th, and an amnesty on October 29th, and that between these dates sixty-eight Courts-martial were held, forty-four persons sentenced, twenty-one executed, and thirty-two flogged or banished (Clode ii. 502).

Martial Law by Governor's Proclamation.—In the Cape Colony disturbances in 1851, the Governor desired to know the extent of his powers under the Mutiny Act, and whether he could commute death sentences passed by Courts-martial; and part of the opinion of the then Attorney-General of the Colony may perhaps, in view of present circumstances, be quoted.

"The question is whether a provision, which in terms applies to soldiers (sentenced for military crimes), can be extended to persons not soldiers who were sentenced by court-martial. As regards this, martial law which is *de facto*, and perhaps *de jure*, as some colonial lawyers think, established by the Governor's proclamation, is distinct from military law under the Mutiny Act and Articles of War. By that species of martial law which, originating in public emergency, extends over all citizens whether soldiers or not, crimes and criminals which have no sort of connection with the Mutiny Act and the Articles of War are brought under the jurisdiction, or at least under the power, of courts-

martial. . . . The Mutiny Act and Articles of War do not necessarily regulate either sentences pronounced by courts-martial against such criminals in regard to such crimes, or the powers of the Commander-in-chief to commute such sentences. . . . Some lawyers think that martial law is *de jure*, and that to suspend the ordinary law and establish martial law is an act competent to the Executive, and one for which no legislative sanction is required, being a branch of ordinary law, and not a foreign and disturbing force obeyed at the moment because irresistible but punishable afterwards unless protected by the legislature. I think an Act of Indemnity is essential in regard to every act *primâ facie* actionable of which the sole defence capable of being pleaded in a civil court rests upon the Governor's proclamation proclaiming martial law or the authority of the Commander-in-chief acting under it. Thus, subjecting rebels to hard labour as well as imprisonment would require such an Act. The Commander-in-chief can order rebels to be kept to hard labour on the same principle as, if the circumstances required it, he could order them to be shot. The need of an Act of Indemnity in general distinguishes martial law which is merely the will of the Commander-in-chief, and that military law stated in the Mutiny Act and Articles of War. . . . If these convicts cannot be detained in districts where martial law now exists, and where it will hereafter continue to exist, a difficulty will arise. Doubts may exist whether the civil courts could recognise in any shape martial law as created by proclamation and not by ordinance; greater doubts may exist whether the civil courts could recognise after withdrawal of martial law imprisonments awarded under martial law and being suffered in districts where martial law had never existed; and still greater doubts whether the civil courts in districts where martial law has not been proclaimed at all could recognise in regard to prisoners brought there from martial law districts sentences of courts-martial upon such persons as these rebels. Questions of much delicacy might arise if these prisoners applied to the Supreme Court in Cape Town for liberation, or were to kill or be killed in trying to escape from a convict station at this end of the Colony. Legislation will be necessary to legalise effectually the imprisonment of all unmilitary persons sentenced by courts-martial or the Commander-in-chief during the existence of martial law and kept in confinement where martial law does not exist" (Clode ii. 506).

An Act of Indemnity was passed in 1853, and also an Act to legalise and continue the imprisonments under sentences of courts-martial.

In 1857 Sir R. Bethell, A.G., advised that there was power to proclaim Martial Law in Hong Kong.

Governor Eyre's Case.—The nature and limits of Martial Law also underwent thorough discussion in the celebrated case of Governor Eyre of Jamaica, both in the Courts and Parliament. The short facts of the case were, that a rising of the blacks took place, some white persons were murdered, and damage done to property: the Governor proclaimed Martial Law in accordance with the provisions of a Colonial statute, and directed the military officers to suppress the insurrection. This they did in two days, executing nearly four hundred persons (eighty-five without trial), and punishing six hundred others by flogging and imprisonment; but under the power given by the Colonial Act, Martial Law continued for a month, and in the course of it a civilian, Gordon, was arrested in a district where Martial Law had not been proclaimed was removed to another where it was in force,

and where it was alleged he had committed treason by inciting the blacks to rise, and after trial by Court-martial was shot. The Legislature of the island then passed an Act of Indemnity to all concerned in executing Martial Law. A Parliamentary Commission was sent to the island, and after exhaustive investigation into all the circumstances of the execution of Martial Law, reported that the declaration of Martial Law was justifiable, the proceedings were rebellious and of deep design, and that the Commissioners fully approved the conduct of the Governor and officers in the prompt measures which they took; but that Martial Law was continued longer than was necessary, and the punishments that were inflicted were excessive in the later stages, and that much that was lamentable might have been avoided if clear and precise instructions had been given for the regulation of those engaged in suppressing the rebellion: and as regards Gordon, they were of opinion that the express evidence forthcoming did not appear to be sufficient to establish the charge against him, and that there was no wide-spread conspiracy to which he was privy. These conclusions were concurred in by the Colonial Secretary, Mr. Cardwell, and criminal proceedings were brought against General Nelson, who was in command of part of the military forces engaged.

On April 16th, 1867, the Lord Chief Justice delivered his charge to the grand jury, and after a careful historical examination of the whole subject expressed the opinion that the Crown had no power to proclaim Martial Law in England since the Petition of Right, and therefore a Colonial Governor under his commission had no such power; that the recital in the Irish Acts relating to Martial Law had no legal effect; that the Jamaica Act only applied to military persons: and told the jury the questions for them were whether there was any power to put Martial Law in force, and if there was, whether it was honestly applied, although if ever there were circumstances in which it was lawful to apply Martial Law, they were present in this case. The grand jury returned no bill, and made a formal presentment that Martial Law should be more clearly defined by legislative enactment.

Similar proceedings were also taken against Governor Eyre, and on June 2nd, 1868, Blackburn, J., charged the grand jury. He directed them that the Governor had under his commission whatever powers the Crown possessed by its prerogative in the reign of Charles II., when the colony was established, as well as the powers under the Jamaican Act: that the Crown had in very early times claimed the prerogative of keeping its armed forces in order by summary process, and this undoubtedly existed in time of war and insurrection, and also a similar privilege in case of disturbance over others than persons belonging to the army; and also against insurgents while the rising lasted, and for a short time afterwards, the Crown had *de facto* exercised the power of proclaiming Martial Law in the sense of using summary proceedings to punish insurgents and check the spread of

the rebellion, so as to "stamp it out." This power the Crown did in fact use, at least in time of war, the last serious instance being in the reign of Elizabeth during the Northern rising; and Charles I. did the same thing in peace time till the Petition of Right. The Legislature in that statute did not in terms declare that in time of war the Crown had no such power, but it did not by any means follow, nor would it be a reasonable inference, that it was legal to do so in time of war. There had been no case since then in which it had been necessary to consider judicially the limit of the powers of the prerogative in time of war, but it was safe to say that in time of peace the Crown had no such power. He thought Hale's deduction from the Earl of Lancaster's case, that "it would appear from this record that in time of peace the Crown cannot enforce Martial Law, and regularly when the King's Courts are open it is time of peace, in judgment of law" very cautious; and he agreed with it, and thought that though it had not been quite settled what was the Crown prerogative in such cases (*i.e.* insurrection) still this much was settled, that it must, if it exist at all, be strictly limited to necessity; and that in this case that limit was passed by the maintenance of Martial Law so long after all disturbance had ceased. The Jamaican Statute, however, gave the Governor much greater powers—namely, to do, after complying with certain formalities, that which the Petition of Right declared the Crown could not do in time of peace, and which it is doubtful whether the Crown could even legally do in time of war—namely, supersede the common law altogether, and punish all manner of offences then done by summary process, in order that the offender might be summarily tried and punished, the great object being to stop the insurrection or invasion. The grand jury returned no bill.

This subject was debated in the House of Commons on July 2nd, 1867, when Mr. O'Reilly, after calling attention to the law as laid down by the Lord Chief Justice in his charge to the grand jury, moved that—

"Whereas by the law of the kingdom no man may be prejudged of life or limb but by lawful judgment of his peers or by the law of the land, and no commission for proceeding by martial law may issue forth to any person or persons whatsoever, by colour of which any of Her Majesty's subjects may be destroyed or put to death contrary to the laws and practice of this land; and the pretended power of suspending of laws or the execution of laws by legal authority without consent of Parliament is illegal, this House will regard as utterly void and illegal any commissions or proclamations purporting or proclaiming martial law in any part of this kingdom,"

Opinions Expressed in the House of Commons.—The following opinions were expressed:

Mr. Forster said he did not agree with the Lord Chief Justice that legislation was desirable to settle the question, for any attempt to provide for the suspension of the ordinary law for the protection of life and property must be regarded as an abdication of legislative power. He admitted that to the restoration of peace and he preservation of authority everything else had to give way, and whatever acts of

military authority were absolutely necessary for that purpose must be sanctioned, but he had seen no case in which what was embodied in the notion of martial law, the power of punishment after the suppression of the outbreak, was essential.

There were two theories of martial law: one, that if martial law was proclaimed in any part of British dominions it meant military law, and giving to military and naval officers similar powers with regard to civilians which they possessed with regard to members of their own services—*i.e.* a court-martial constituted under the same regulations as one for the trial of a military or naval officer—and this view had been held by all the lawyers in our history, from Hale to Cockburn: the other, that martial law applied to civilians was not military law, but the arbitrary will of the Executive; the Instructions issued by the Admiralty for the guidance of naval officers did not agree with the law as stated by the Lord Chief Justice, for they said that the arbitrary will of the officers in such cases superseded the ordinary law for the time being in the same manner and degree as if the district where it was proclaimed were enemy's country.

Mr. Gathorne Hardy, Secretary of State, on the other hand, said that it was lawful according to Hale to call out any force to put down insurrection, and put in force military instead of ordinary law: military power included military law. The Lord Chief Justice's view was not law, and it was not in accord with those of a former Judge Advocate, Sir David Dundas, and the last Judge Advocate, Mr. Headlam; and the resolution embodied doctrines which had never been affirmed either by statute or by judicial decision.

Mr. Mill expressed the view that there was no such thing, properly speaking, as martial law as regards non-military persons, and it had no existence except for military purposes. Parliament could give it existence, but the Crown could not, being only one branch of the Legislature. But there was a law of necessity, *e.g.*, in case of rebellion, requiring that acts not justifiable by the ordinary law of the country should be done, and that these should be acts of suppression, not punishment. In case of public necessity, those who acted on it as in private necessity, and did under supposed necessity what they would not ordinarily be justified in doing, should be amenable to the laws of their country; and he contended that the law of necessity justified the Executive in doing these things if no such thing as martial law had ever been heard of: but the necessity which existed must be shown, not to the satisfaction of a court-martial only, but of the regular courts of the country.

Mr. Headlam thought it better not to alter the existing law: whether they called it martial law or the law of necessity it was the same thing—the difference was merely verbal. If the Executive authority superseded the ordinary law of the country when a sufficient case of necessity arose, they were all agreed that it should be supported in that, and that it should be covered by an Act of Indemnity afterwards. A precise declaration might fetter and control public men, and make them too timid to perform their duty in emergency; on the other hand it might tempt weak men to exercise powers which ought not to be exercised unless absolutely necessary. Those were two different kinds of dangers, and the best way of guarding against them was to leave the law as it was, and make it perfectly clear to persons in authority that they must act in case of emergency and take the responsibility upon their own shoulders, looking to an Act of Indemnity to exonerate them if they had acted honestly and in good faith.

Mr. Cardwell, ex-Colonial Secretary, agreed that while there was properly no such thing as martial law, there was no doubt a law of necessity which required that certain acts should be done for the suppression of the rebellion, but not for

the punishment of persons concerned in it: a law of necessity which nobody acted under, except under very great responsibility and liability to render account to the ordinary tribunals of the country. Persons who, called upon by no act of their own, but for the public safety, took a great responsibility of that kind, were placed in a position of extreme difficulty; and it often happened that to protect them, as Parliament afterwards thought just, a bill of indemnity was passed. That, however, was an act not of prerogative but of Parliament, and until such an Act these persons acted subject to a liability to account to the ordinary tribunals. Believing that to be law, and a wholesome state of law, he did not think any alteration of it necessary. The law of necessity to which he had referred was strictly limited in time, and operative only for repression and not for punishment; and, in Mackintosh's words, to continue to act upon that necessity after it had expired was an enormous crime.

Major Jervis called attention to the terms of the proviso of the Irish Act of 1833, and said martial law was the law of the strongest, and if carried out by any governor of a colony the House would stand by him if he was in the right.

In the result the motion was withdrawn (188 *Hansard*, 899).

Conclusions from Cases.—To sum up the result of the foregoing precedents, it seems that by constitutional practice at any rate, if not in principle, Martial Law in British dominions, where it exceeds the Common Law prerogative of the Crown and its officers to keep public order by the use of force, including the assistance of the military, as used in the case of riots, is not part of ordinary English law, so that any one exercising it is liable at law to any person injuriously affected by it, unless Parliament or the colonial legislature, as the case may be, indemnifies him for what he did to meet the necessity of the moment. Lord Chief Justice Cockburn declared that "the exercise of martial law cannot be put on a worse footing than saying that, though it is illegal, a governor or other Crown executive officer is bound in case of necessity to put it in force and trust to Parliament afterwards affording a statutory indemnity" (*R.* v. *Nelson*, special report, 74); but the reason for this apparently illogical position seems to be, in Mr. Forster's words in the Jamaica debate, that "to provide for the suspension of the ordinary laws for the protection of life and property by the substitution of military authority must be regarded as an abdication of legislative power"; and this has been uniformly the view of the Colonial Office. Thus we find the Duke of Newcastle, when Colonial Secretary, objecting to the statement in the Colonial Act of Indemnity passed after the existence of Martial Law in St. Vincent in 1862, that "the proclamation of Martial Law had been lawfully issued," on the ground that "the proclamation was right and necessary but was not strictly lawful, and to declare it so would be to endanger a most important constitutional principle. In proclaiming Martial Law the executive authority in fact declares itself obliged, for the protection of the community, to neglect the law, trusting to the Legislature to relieve all who in obedience to constituted authority may have acted in the defence of the public safety from the consequences of so doing. The indemnity contained in the second clause is too wide. It would enable a person to escape punishment

for the most wanton and unjustifiable acts, even to homicide, if it could be shown that he had been in any wise engaged in suppressing or endeavouring to suppress the insurrection" (Clode ii. 511). So in 1867 Lord Carnarvon, when Colonial Secretary, refused to recommend for the royal assent an enactment of Antigua, making it legal for the Government to proclaim Martial Law.

Circular to Governors of Colonies.—As this despatch was circulated to all governors of colonies, it may perhaps be quoted at length, as embodying the tradition of our Colonial Office.

> An enactment which purports to invest the Executive Government with permanent power of suspending the ordinary law of the Colony, of removing the known safeguards of life and property, and legalising in advance such measures as may be deemed conducive to order by the military officers charged with the suppression of disturbances, is entirely at variance with the spirit of English law. If its existence can in any way be justified, it can only be because there exists such a state of established insecurity as renders it necessary, for the safety and confidence of the well-disposed, that in times of national emergency the Government shall possess this extraordinary facility for the suppression of armed rebellion; but, whatever apprehensions or disturbances may exist in any of Her Majesty's colonies, it is certain that no such chronic insecurity prevails in any of them, and in no colony therefore should the power given by the present law to the Governor of Antigua be suffered to continue. . . . In giving you these instructions Her Majesty's Government must not be supposed to convey an absolute prohibition of all recourse to martial law under stress of great emergencies, and in anticipation of an Act of Indemnity. The justification, however, of such a step must rest on the pressure of the moment; and the Governor cannot by any instructions be relieved from the obligation of deciding for himself under that pressure whether the responsibility of proclaiming martial law is or is not greater than refraining from doing so (Clode ii. 667).

An exception to this rule is however made in the case of India, where the Governor-General is empowered by statute to declare and establish Martial Law for the safety of the British dominions and the security of the lives and property of their inhabitants, and to direct immediate trial by Court-martial of all persons owning allegiance, and then in arms in open hostility to the Government, or in the act of opposing by force of arms the authority of the same, or in the actual commission of any overt act of rebellion against the State, or in the act of openly aiding and abetting the enemies of the Government (Regulation X. of 1804).

Acts of Indemnity.—The fact that every proclamation of Martial Law in the United Kingdom or the Colonies has been followed by an Act of Indemnity (they are set out in *Phillips* v. *Eyre*, 1870, R 6, Q.B. 15) would of itself be strong ground for showing that it is unknown to the ordinary law, although advocates of the extreme Crown prerogative might regard them as only measures of precaution, and point to the fact that the Irish Parliament passed an Act of Indemnity for all acts done in good faith and of necessity in the execution of the Irish Martial Law Statute of 1799

(1801, 41 Geo. III. 104). But this inference is strengthened by the fact that Acts of Indemnity have always been purposely framed so as to give Parliamentary sanction only to such acts as have *bonâ-fide* and of necessity been done to meet the demands of the emergency justifying the proclamation of Martial Law. Thus it was held that such an Act will not protect persons who have been exercising Martial Law from criminal liability for any excesses of authority committed by them, on the ground that these are not justified by necessity (*Wall's case*, 1802, 28 State Trials 51; *Wright* v. *Fitzgerald*, 27 *ibid.* 765); and Mr. Cardwell, Colonial Secretary, in a despatch to the Commissioners sent to inquire into the circumstances of the Jamaica rising in 1865, stated that the Crown had been advised by the Law Officers that "an Act of Indemnity will not cover acts done by the Governor or his subordinate officers unless they are such as, in the case of the former, be reasonably and in good faith considered to be proper for putting an end to the insurrection, and in the case of the latter done in conformity with the orders of their superiors, or if done without orders, then in good faith and the belief that they were proper for suppressing the rebellion and the preservation of the public peace. As to all acts done by military authority, the proclamation of Martial Law under the Jamaica Statute of 1844 was a complete indemnity in the proclaimed districts by the Indemnity Act itself" (Finlason, *Martial Law*, 40). Colonial Secretaries have also frequently refused to recommend for the Royal assent Colonial Acts of Indemnity which go beyond these limitations: *e.g.* the St. Vincent case above.

Methods of Administering Martial Law.—The justification, then, of Martial Law being necessity only, as entitling those exercising it to indemnity, the method of administering it is also determined by the necessity of the circumstances of each particular case; and if so, the Mutiny Act and Articles of War do not limit and determine the method of executing it, in spite of Mr. Forster's statement above.

Sir J. Stephen in his joint opinion with Mr. E. James in the *Eyre* case adopts Sir David Dundas' definition given to the House of Commons Committee on the Ceylon disturbances in 1849, that "Martial Law is the rule of necessity, and when it is exercised by men empowered to do so, and they act honestly and vigorously and with as much humanity as the case will permit in the discharge of their duty, they have done that which every good citizen is bound to do"; and defines Martial Law as "the assumption by the officers of the Crown of absolute power exercised by military force for the suppression of insurrection and the restoration of order and lawful authority. The officers of the Crown are justified in any exertion of physical force, extending to destruction of life and property to any extent and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive measures, but are liable civilly and criminally for each excess. They are not justified in inflicting punishment after

resistance is suppressed and after the ordinary courts of justice can be reopened. The courts-martial by which this Martial Law is administered are not courts at all, or courts-martial properly speaking; they are merely committees formed for the purpose of carrying into execution the discretionary power issued by the Government. On the one hand they are not obliged to proceed in the manner pointed out by the Mutiny Act and Articles of War; on the other hand, if they do so proceed, they are not protected by them as the members of a real court-martial might be, except so far as such proceedings are evidence of good faith. They are justified in doing with any forms and in any manner whatever is necessary to suppress insurrection and restore peace and the authority of law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and Articles of War."

The opinion of Sir D. Dundas in this part of the subject may also be quoted. He expressed his opinion that "Martial Law is a *lex non scripta*—a law of necessity: there is no practice laid down for it, but it must be exercised by those who have to exercise it firmly, truthfully, and with as much humanity as occasion allows, according to the conscience and good sense of those who have to exercise it: the military tribunals administering it need not be presided over by military officers, and they are not necessarily guided by the Mutiny Act or Articles of War; but any officer forming part of them could not go very far wrong if he adhered as closely as possible to the mode of administering law under the Army Act, and the oath under that Act would be a very safe and honest guide in such critical cases; no difference is made between soldiers and civilians in punishing offences." Other military lawyers agree that the military code prevails, and not the civil law; the mode of trial is summary and speedy, and the strict rules of evidence followed in Civil Courts are not adhered to.

In Ceylon in 1817 and 1818 the Governor issued his warrant to certain officers of rank, commanding them to hold Courts-martial in their districts, together with letters of instructions detailing the mode of trial so as to ensure a fair trial; and the courts were conducted with the forms laid down by the Articles of War. In 1848 a British commanding officer in one of the proclaimed districts of Ceylon instructed his subordinate officer "not to bring to trial any person you are not certain of convicting: your power is unlimited, but at the same time it will be well to adhere to the Articles of War as far as possible, appointing a judge advocate and provost marshal: and after disposal of each culprit, you will forward the proceedings to me."

In India, as already pointed out, the Governor-General is empowered by statute to declare and establish Martial Law. Advocate-General Spankie, in advising concerning sentences of Courts-martial passed in the Cuttack rising in 1817-18, said that "the statute meant that none but cases of the simplest and most obvious criminal nature should be subject to such trial, and that in the cases under review there seemed to be no

reason why the criminals should not have been set before the ordinary court, agreeably to the express directions and instructions of the Government"; and he described Martial Law as "in fact the law of social self-defence superseding under the pressure and therefore the justification of extreme necessity the ordinary forms of justice. Courts-martial under martial law, or rather during the suspension of law, are invested with the power of administering that prompt and speedy justice in cases presumed to be clearly and indispensably of the highest species of guilt. Its object is self-preservation by terror and the example of speedy justice. But courts-martial which condemn to imprisonment and hard labour belie the necessity under which alone the jurisdiction of courts-martial can lawfully exist in civil society." (Hough, 1855, *Military Law* 548).

In the Demerara case (11 *Hansard* N.S. 961, 1206) the question was raised which law was to be applied by the Court-martial sitting under Martial Law, the law of the country (Dutch), or the law of England by which alone soldiers would be governed; Mr. Smith having been sentenced to death, which was justifiable by the Dutch law as punishment of suspicion of treason, but not by English law. The Attorney-General (Gifford) inclined to the former view; others who took part in the debate did not; but the view of Simmons and Finlason is that, if civilians are amenable like soldiers to Martial Law, and the latter are undoubtedly governed by the law of England, the former must be so too. On the principle of necessity, however, the fact of applying one kind of law and not another is only important as evidence of the bad or good faith of the Court-martial on the question whether its members shall be indemnified for their acts.

Relation of Civil Courts to Martial Law.—In old days prohibition lay to the court of the marshal and that of the constable and marshal from the Court of King's Bench, if it exceeded its jurisdiction (2 Hawkins, *P.C.*, ch. iv., p. 17); and the High Court of Justice in England, and similarly the Supreme Court in any colony, have the right of supervising proceedings by Court-martial. But owing to the careful provisions of the Army Act in this respect, confining the sphere of the ordinary Court-martial under military law to purely military offences in most places, and taking care to secure a preponderating jurisdiction to the Civil Courts for serious civil offences, this very rarely can take place. Thus the Court of Queen's Bench has refused to prohibit a Court-martial which has passed sentence on a soldier after a trial conducted with substantial justice, though not according to the strict procedure of Civil Courts (*Grant* v. *Gould*, 1792, 2 H. Bl. 69); and it has refused a writ of *habeas corpus* in the case of soldiers detained in custody for trial by Court-martial where there is no oppressive delay shown. Under Martial Law the considerations are different. If it is in force throughout a colony, no Courts can sit which can interfere with the Courts-martial; but Martial Law may only be put in force for certain purposes or in certain places: *e.g.*, in Jamaica, in 1867, only certain districts of the

island were put under Martial Law, and in the same colony, in 1757, the British Law Officers advised that the proclamation of Martial Law did not suspend the ordinary course of law and justice any further than was absolutely necessary to answer the exigencies of the public and military service, nor did it suspend the exercise of legislative authority (Forsyth, *Opinions*, 288; Chalmers, i. 267). In such a case the questions suggested in the opinion of the Attorney-General of Cape Colony in 1851, quoted above, may arise: *e.g.*, persons arrested by the military authorities in districts under Martial Law, and kept in military custody there before or after sentence, or brought to districts where Martial Law does not prevail to undergo their sentence, may apply to the Civil Courts for a *habeas corpus*. English Courts have decided that the privilege of this writ is not available for alien enemies or persons consorting with enemies made prisoners of war; and in one case, that of the Canadian prisoners in 1838, have refused it to rebel subjects brought within the realm of England, who on indictment in a Colonial Civil Court had confessed their guilt, and had thereupon, under the provisions of a special colonial statute, received a pardon from the Governor conditional on their engaging to leave the colony, on the ground that although they had not been tried or sentenced on a criminal charge by a Civil Court, and the effect of the statute was confined to Canada, still they were on their own admission guilty of treason, and any good subject was therefore bound to keep them in custody for trial and punishment (*R.* v. *Batcheldor*, Fry's Special Report, and 5 M. and W. 32); and the Courts have held that they, having only civil jurisdiction, could not grant a *habeas corpus* to bring up a defendant to be charged in execution who is under military arrest under circumstances which might or might not lead to a Court-martial unless he is in the custody of a civil gaol-keeper (*Jones* v. *Danvers*, 1839; *ibid.* 234). But where a Civil Court has jurisdiction over the whole of a colony in districts of which Martial Law has been proclaimed and Civil Courts are not sitting, an application for a writ of *habeas corpus* before the Supreme Court in the case of a civilian rebel subject in military custody in a proclaimed district must, it would seem, be successful, although the moment he was set free he could be re-arrested and tried civilly, unless that military custody can be justified by statute or common law (*Allen's case*, 1860, 3 E. and E. 338), or by the sentence of a duly constituted Military Court in a place where no civil judicature prevails (*R.* v. *Suddis*, 1801, 1 East, 306).

Where a person arrested by military authority in a district where Martial Law does not prevail is taken to another where it does, and put on trial there, it seems that that is an illegal act and unjustifiable, except perhaps if the executive officer reasonably comes to the conclusion that a dangerous insurrection and conspiracy is spreading throughout the land, likely to break into insurrection all over it if not suppressed, and that it was really proper in order to suppress it that the particular person should be summarily tried because there is no time to wait (Blackburn J., *R.* v. *Eyre*, above). Lord

Chief Justice Cockburn and the majority of the judges were, however, of opinion that the procedure made use of in this respect against Gordon was altogether unjustifiable, and he laid down the following rule for the guidance of executive officers who set Martial Law in force: "The officer, so far as his criminal responsibility is concerned in judging of the necessity which it is admitted on all sides is the sole justification for reverting to martial law, should not only act with an honest intention to discharge his public duty, but should bring to the consideration of the course to be pursued the careful, conscientious, and considerate judgment to be expected from one invested with authority; and having done this he would not be liable for an error in judgment or excesses by subordinates if advised that the law of the colony justify him."

By Statutes of 1700 (11 & 12 Will. III. & Mary 7) and 1802 (42 Geo. III., 85) no executive officers of the government of British colonies are liable to criminal proceedings in the courts of the colonies, but only to the Queen's Bench in England: but they are liable civilly (*Hill* v. *Bigge*, 1841, 3 Moore P.C. 466). A Colonial Act of Indemnity will, however, relieve them from any liability to criminal or civil proceedings in the Colonial or British Courts, though Blackburn J. doubted whether it would do so as regards criminal proceedings in England if a true bill had been found previously to the passing of the Act. In *Phillips* v. *Eyre* above, Willes J., in giving the judgment of the Court that the Colonial Act of Indemnity was a good defence to any civil action in respect of proceedings under Martial Law, said that it must not be understood that the Court thereby intended to express any opinion that the plea might not be sustained upon more general grounds, as showing that the acts complained of were incident to the enforcement of Martial Law, a question which it was unnecessary to discuss (31).

It is difficult to see in what respect the principle which we have adopted of deliberately refraining from giving shape or substance to this law of necessity, by requiring that its application shall be justified by the Legislature, and that its application shall only interfere with ordinary law to the extent of the necessity demanded by the particular emergency, has any advantage from a legal point of view over the plan of giving previous legal sanction to whatever measures are necessary for the safety of the country in emergency, under the same conditions as are now applied in case of statutes of indemnity. Lord Chief Justice Cockburn was in favour of some such plan being adopted. It may be worth while to supplement the consideration of our own system with a short statement of the views taken on this subject in the United States and France.

United States.—In the United States there has been some considerable discussion of the subject, chiefly due to the state of circumstances brought about by their Civil War, 1861—1865; and such discussion has been more

comprehensive and discriminating, owing to its recent date, than it has been in England.

Kent (1896 [10th ed.] *Comm.* i. 341 note) says, "Martial Law is quite a distinct thing from ordinary Military Law, and is founded on paramount necessity, and proclaimed by a military chief": Bishop (*Crim. Law*, 1882, ss. 43—68) says, "Military Law is distinct from Martial Law, which in fact is, as Blackstone says, no law, but an expedient resorted to in times of public danger similar in its effect to the appointment of a dictator"; and the United States' Instructions to their Armies in the Field define martial law as "simply military authority exercised in accordance with the laws and usages of war; it may be totally suspensive of civil authority, or it may be light, and the Courts may go on in their ordinary course (as in Kentucky, in the Civil War, where martial law was not allowed to interfere with suits or proceedings which did not affect the military operations or the constituted United States authorities): there is no martial law in peace, and necessity only justifies it." Chief Justice Chase, of the United States Supreme Court, in the case of *Ex parte Milligan* (1866, 4 Wall. 2), thus classified the various legal aspects of military and martial rule. "There are three kinds of military jurisdiction, one to be executed in both peace and war; another in foreign war outside the limits of the United States, or in time of rebellion and civil war in states or districts occupied by rebels treated as belligerents; and a third to be executed in case of invasion or insurrection in the United States, or during a rebellion in States maintaining an adhesion to the National Government when public danger requires its exercise. The first is Military Law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second is Military Government, superseding as far as may be deemed expedient local law, and executed by military commanders, under direction of the President, with the express or implied sanction of Congress; the third is Martial Law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited in case of justifying or excusing peril, by the President, in times of insurrection or invasion, or civil or foreign war within districts or localities where the ordinary law no longer adequately secures public safety and private right" (141-2).

The question has usually been raised in the form of a *habeas corpus* writ directed to military authorities having custody of a prisoner in districts subject to Martial Law. This subject has been dealt with generally by Attorney-General Cushing in 1857, in advising the Executive that the Governor of a territory of the United States had not among his legal attributes the power to suspend law and substitute Martial Law in place of Civil Law, when this was admitted to be the object of preventing the use of a writ of *habeas corpus* in behalf of certain persons held in confinement by military authority on a charge of treasonable intercourse with the enemy. After remarking that Hale and Lord Loughborough confound Martial Law with

Military Law, and that Martial Law as defined by the Duke of Wellington in the Ceylon Debate is widely different from that in the mind of Earl Grey, which was of Martial Law as a purely domestic fact proclaimed in rebellion or insurrection in England, Ireland, or some colony, which seemed to him evidence of "the extreme want of preciseness, with which so vital a question had been discussed and expounded in England, though in his own country it had been even worse," Mr. Cushing says:

Martial Law must be distinguished according as it is a foreign or international fact, or as it is a domestic or municipal fact. As executed in any country by the commander of a foreign army, it is an element of the *jus belli*, incidental to the state of modern war, and appertaining to the law of nations. The commander of an invading, occupying, or conquering army rules the country with supreme power, limited only by international law and the orders of the sovereign or government which he represents. By the law of nations *occupatio bellica* in a just war transfers the sovereign power of the enemy's country to the conqueror. Such occupation by right of war, so long as it is military only, *flagrante bello*, will be the case put by the Duke of Wellington, of all the powers of government resumed in the hands of the Commander-in-chief, or that of the United States' armies in Mexico. This does not enlighten us as to martial law in one's own country and as administered by our military commanders. That is a case the law of nations does not reach. In England Earl Grey assumes that when martial law exists it has no legal origin, but is a mere fact of necessity, to be legalised afterwards by bill of indemnity if there be occasion. I am not prepared to say that under existing laws such may not be also the case in the United States.

After describing the Continental "state of siege" (to be noticed afterwards) Mr. Cushing continues:

A state of siege may exist in a city or a district of country either by reason of the same being actually besieged or invested by hostile force or by reason of domestic insurrection. The 'state of siege' of Continental jurists is the proclamation of martial law of England and the United States; only we are without law on the subject, while in other countries it is regulated by known limitations. Our Constitution, it is true, empowers Congress to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government of the land and naval forces, etc.; but none of these powers have been exerted in the solution of the present question. There is one clause in the Constitution of some apparent relevancy—viz., that the privilege of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it. . . . We have in Great Britain recent examples of Acts to give constitutional existence to the fact of martial law [quoting the Irish Statutes]. These examples show that in the opinion of the statesmen of that country the general existence of the fact of martial law, and its incidental suspension of writ of *habeas corpus*, alike require the exercise of the power of the supreme legislative authority. That idea pervades the constitutional organisation of several States of the Union—Massachusetts, etc. It may be assumed as a general doctrine of constitutional jurisprudence in all the United States, that the power to suspend laws, whether those granting the writ of *habeas corpus* or any other, is vested exclusively in the legislature of each State. How intimate the

relation is or may be between the proclamation of martial law and the suspension of the writ of *habeas corpus* is shown by the particular facts before me. . . . That however, is but one of the consequences of martial law, and by no means the largest and gravest of them, since according to every definition of martial law it suspends for the time being all law of the land and substitutes no law, viz. the mere will of the commander. There may be and have been emergencies of necessity capable of themselves to produce and justify such suspension of all laws and involving for the time the omnipotence of military power. But such a necessity is out of the range of mere legal questions. When martial law is proclaimed under circumstances of assumed necessity the proclamation must be regarded as the statement of an existing fact rather than the legal creation of that fact (*Opinions of Attorney-General*, s. viii., 368-9).

In the American Civil War, for purposes of the war, military districts were created extending over States loyal to the Union and adjacent to the scene of military operations, but not invaded, which by Act of Congress were administered by military commissions; and this authority occasionally clashed with that of the regular Federal Courts, which were open and exercising their functions properly and unobstructedly there. To take one case (*Ex parte Milligan*, *ante*), a civilian was tried before one of these military commissions in the State of Indiana on a charge of conspiracy, etc., against the United States, and was found guilty and condemned to be hanged. He applied to the United States Circuit Court for Indiana for a *habeas corpus*, showing that his sentence had been approved by the President as to be put in execution without delay, all by order of the Secretary for War, and that during his detention in military custody a grand jury of that Circuit Court had met at the place where he was confined, and sat and adjourned without finding any bill of indictment against him. The Court held that in such a case the commissions had no jurisdiction to try, convict or sentence for any criminal offence a citizen who was neither resident in a rebellious state, nor a prisoner of war, nor in military or naval service; that a citizen not connected with the military service, who resided in a state where the Courts were open and properly exercising jurisdiction, could not, even where the privilege of the writ of *habeas corpus* was then suspended under the power given in the Constitution, be tried or sentenced otherwise than by the ordinary Courts of Law; that he could not be regarded as a prisoner of war, and that the guaranty in the Constitution of trial by jury was intended for a time of war as well as for a state of peace, and could not be interfered with by President, Congress, or Judiciary, except so far as suspending the writ of *habeas corpus* in certain specified cases. The minority of the Court held that the case did not come within the words of the Act of Congress, but otherwise agreed with Chief Justice Chase in the opinion quoted above. Davis, J., however, who gave the opinion of the Court, remarked that "it was not a question of the power to proclaim martial law when war exists in a community and the civil authorities are overthrown, nor a question what rule a military commander at the head of

an army can impose on States in rebellion to cripple their resources and crush the insurrection. Martial law could not arise from threatened invasion: the necessity must be actual and present, and the invasion such as effectually closes the Courts and deposes civil administration: if in a foreign invasion or civil war the Courts are actually closed, and it is impossible to administer criminal justice according to law, then, in the theatre of active military operations, where war really prevails, there is a necessity to provide a substitute for civil authority thus overthrown . . . and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule it limits its duration, for if this government is continued after the Courts are reinstated it is a gross assumption of power: martial law can never exist where the Courts are open and in the proper and unobstructed exercise of their jurisdiction, and it is also confined to the locality of actual war" (see also *McCardle's case*, 1868, Mr. D. D. Field's argument, Forsyth 491).

In an earlier case the United States Supreme Court refused to question the right of the legislature of a State (Rhode Island) to proclaim Martial Law in order to put down a civil insurrection with which its civil power could not cope (*Luther* v. *Borden*, 1849, 7 How. 1, 45 ff.). Bishop says, "In the extreme circumstances which justify it, martial law may be proclaimed by military commanders, or, as in the Rhode Island rebellion, by the legislature (i. s. 45). The test whether it prevails is whether in case of conflict between the civil and the military authorities the former prevails or not. In New Orleans, when General Jackson in 1814 assumed with his army the control of the city and arrested a person whom a judge thereupon attempted to discharge on a writ of *habeas corpus*, and thereupon arrested the judge and sent him out of his lines and the city, martial law prevailed; but when, after war was over, the judge returned, and in his seat fined the general as for a contempt, the civil power prevailed: the question of the power of the persons administering the national government to declare martial law is not as clear on the face of the Constitution as some others: the judges have no power over it, as the Constitution only gives them 'judicial power': but the power of 'making war,' which belongs to Congress and is executed by the President, would include the right to proclaim and enforce martial law." But Winthrop regards this as "more curious than sound" (*Military Law*, 1886, ii. 40). In *Ex parte Field* (1862, 5 Blatch. 63, 82), a Circuit Court held that the President or Congress had power in the military exigencies of the country to proclaim Martial Law, and as a necessary consequence thereof the suspension of the writ of *habeas corpus* in the case of military arrests: that this was so in Vermont, although distant five hundred miles from the seat of war, and the enforcement of Civil Law had not been interfered with there: and that the President is the sole judge of whether Martial Law shall be proclaimed or not: and in *Ex parte Vallandigham* (1863, 1 Wall. 243), the Supreme Court held that

it had no power to review by *certiorari* the proceedings of military commissioners ordered by a general of the army commanding a military district which had tried a civilian: and see Whiting, *War Powers* (1871, 202, and *Attorney-Generals' Opinions*, x. 74). But the balance of authority in the United States seems to regard the President as having no power to suspend the writ of *habeas corpus* of his own authority; and Congress accordingly, in 1863, passed an Act giving him power to suspend it when in his judgment the public safety might require it during the war. Winthrop comments on the difference between English authorities as to the nature of Martial Law and the extent of military control which it justifies; one view being that it is the application to the citizen of the code of the soldier, the other that it is a discretionary power in the hands of a military commander to be exerted so far as the military necessities of the exigency require; and says that the latter accords more nearly with the American law and practice, by which Martial Law resembles the Continental "state of siege."

État de Siège.—In France Martial Law is regulated by special legislation. The law of August 9th, 1849, provides that it is only declarable in case of imminent peril for internal or external safety; it can only be declared by the National Assembly, and, if this be prorogued, by the President on the advice of the Council of Ministers, who must at once form the commission constituted by Art. 32 of the Constitution, and, if the situation be grave, convoke the National Assembly. The prorogation of the Assembly ceases when Paris is declared in a state of siege, and the Assembly continues or puts an end to it. In French colonies the state of siege is proclaimed by the Governor, but he must give immediate notice to the Home Government. In military places the commandant declares it, and must at once inform the Government. The effect of its declaration is that all the power of the civil authority passes entire to the military with regard to order and justice, but the former continues to exercise the powers left to it by the latter. Military tribunals can take cognisance of crimes and offences against the safety of the Republic, etc. Only the Assembly can raise a state of siege, unless it be prorogued, when the President can do so, as he can in the colonies and military places.

The law of April 3rd, 1878, further provides that a state of siege can be declared in case of imminent peril resulting from foreign war or armed insurrection: only law can declare it and the districts where it is to prevail. If the Chambers are prorogued, the President can declare it on the advice of the Council of Ministers, but the Chambers must meet two days afterwards. If the Chambers are dissolved, and during the time of electoral operations, it cannot be declared even provisionally by the President; except that, if there be a foreign war, he can, on the advice of his Council of Ministers, do so in the territory menaced by the enemy, or on condition of convoking the electoral college and chambers as quickly as possible.

The Governor of Algeria, if its communication be cut off, can declare all or part of it in a state of siege. In the event of the adjournment and dissolution of the Chambers, the Chambers when they reassemble can continue or raise it, and if they disagree it is raised at once. The provisions of the law of 1849 as to colonies and military places are retained, as are all others not inconsistent with the present law (*Roger* v. *Sore*, *Lois Usuelles*, 785 [1895]).

UNFAIR COMPETITION IN GERMANY.

[*Contributed by* JULIUS HIRSCHFELD, ESQ.]

Tardiness of German Legislation.—Contrary to its habitually brisk pace, German legislation had until a comparatively recent date been rather lagging behind other nations in the matter of protecting traders against unfair competition. Professor Dr. Kohler, writing fifteen years ago a treatise on the subject of trademarks, and choosing for his motto Senator Lott's dictum,[1] "Honest competition relies only on the intrinsic merit of the article brought into the market, and does not require a resort to false or fraudulent device or token," pathetically exclaimed: "If German jurisprudence would tread the hydra of disloyal competition on the head as vigorously as the English, the Anglo-American, the French, and the Italian do, then will come the time when German industry will raise its head and enter the market as a world power." The learned professor's longing has since then been more than realised—at least as far as the legal aspect is concerned. The Trademarks Act of 1894, in one or two of its sections, had already foreshadowed the firm determination of the Legislature to check unfairness in competition, and it has been followed by an Act of 1896 dealing with the subject in a truly resolute manner.

The Trademarks Act, 1896: Fraudulent Advertisements.—The predominant feature of the new law is its severe treatment of false and fraudulent advertisements (*Reclame-Schwindel*): "Every person who, in respect of business matters generally, in particular the quality of goods, the mode of their manufacture, exceptional price quotations for goods, or work to be done, the way in which they were bought or the place they came from, the holding of medals, etc., the occasion for or object of the sale, shall, by public advertisements or communications intended for a larger number of persons, make false statements calculated to give the appearance of an especially favourable offer, is liable to an injunction at the instance of any one trading in goods of the same or a cognate kind or of incorporated societies formed for the promotion of commercial interests. Damages may be claimed in cases where the advertiser knew that the representations were false, and damages may also be claimed against editors, publishers, printers, and vendors of periodicals acting *mala fide*. Illustrations calculated to

[1] *Taylor* v. *Carpenter Cox, American Trademark Cases*, p. 56.

deceive are to be dealt with in the same manner. In addition to such civil proceedings, a *mala-fide* advertiser is liable to a fine not exceeding £75. In case of repeated offences against this Act he may, in addition to the fine, be sentenced to a term of imprisonment not exceeding six months."[1]

Employé betraying Secrets.—Another section which may interest[2] English readers is to this effect: "An employé, workman, or apprentice who during the currency of his employment betrays his master's business or trade secrets in the interest of a competitor, or in order to injure his employer, is liable to a fine not exceeding £150 or a term of imprisonment not exceeding one year. Every person who takes advantage of such communications for the purpose of unfair competition, or who becomes possessed of such knowledge by unlawful or immoral means, is equally punishable."[3]

Reciprocity towards Foreigners.—There is, lastly, the reciprocity principle as regards foreigners, which is hardly ever absent from modern German enactments.

Agreements with Employés in Restraint of Trade: Time Limit.—In conclusion I may observe that the new German Commercial Code contains a provision whereby an agreement between a master and an employé, stipulating for non-competition on the part of the latter, is only valid for three years after the termination of such relationship.

[1] A few instances culled from theory and practice will give an idea of the scope of this provision: A hosier displaying in his shop-window weaving implements, implying thereby that he is himself the manufacturer of the article he sells; a dealer in amber having in his window illustrations of amber dredging or digging operations implying that he carries on that industry himself; a tobacconist exhibiting representations of American tobacco plantations, whilst only selling German-grown tobaccos;—all these will come within the pale of the law. Other cases are: Misstatements as regards the extent of the circulation of a newspaper; a dentist advertising painless dentistry; a quack safe cure; misstatements as to patent medicines (*Geheimmittel*)—performances in hypnotism or magnetism belong to the same category; a tradesman falsely using the attribute "by appointment," or misstating the age of his business. Another class of fraudulent representations would be untrue statements that the stock of a bankrupt, goods from a deceased person's estate, or bought at a compulsory sale by auction are being offered.

[2] I limit myself to such provisions as are foreign to English law.

[3] Even an attempt to induce an employé, etc., to betray secrets is punishable. All the offenders are also liable to damages or fines.

THE ENGLISH STATUTE BOOK.

[*Contributed by* Sir Courtenay Ilbert, K.C.S.I.]

What is the English Statute Book? What are its contents? Where are they to be found? How are they arranged? What facilities are there for ascertaining the enactments which have been made on a given subject, and the extent to which they are in force? The object of this chapter is to supply an answer to these questions.

Meaning of "Statute."—The word "Statute" is in ordinary English usage treated as equivalent to Act of Parliament, and the English Statute Book might therefore be expected to include all Acts passed by the Parliament of England, or, since the union with Scotland and Ireland respectively, by the Parliament of the United Kingdom. But the Statute Book includes certain enactments which are not, in the strictest sense, Acts of Parliament, and excludes certain enactments which are. When Parliament was first taking shape as a legislative body, laws were made, not by the King, Lords, and Commons in Parliament assembled, but by the king, with the counsel and assent of the great men of the realm; and the legislation of the reign of Henry III., and most of that of Edward I., was the work of assemblies to which the Commons were not summoned. The line between Royal Ordinances and Acts of Parliament is not easy to draw in the first stages of Parliamentary legislation, and some of the most important among the early enactments in the English Statute Book, including the Statute "Quia Emptores," would not comply with the tests applied to a modern Act of Parliament. On the other hand, the ordinary editions of the "Statutes at large"[1] exclude numerous Acts of Parliament as being either local or private. The line between general and local, public and private, Acts has been drawn variously at different times, and will be referred to hereafter. For the present, the Statute Book will be treated as including only the public general Statutes.

Statutes of the Realm.—The first edition of the English Statutes which was at once authoritative and collective was that commonly known as the *Statutes of the Realm.* The Parliament of 1800 (the Parliament which passed the Act of Union with Ireland) devoted much attention to the condition of the public records, and a Select Committee of the House of

[1] This phrase appears to occur first in one of the Elizabethan editions of the Statutes, that by Barker.

Commons presented a report on this subject on July 4th, 1800. One of the conclusions arrived at in this report was that it was highly expedient for the honour of the nation and the benefit of all Her Majesty's subjects that a complete and authoritative edition of all the Statutes should be published. The report of the committee was followed by an address to the Crown, which led to the appointment of the first Record Commissioners. The Commissioners at their first sitting resolved, "That a complete and authentic collection of the Statutes of the realm be prepared, including every law, as well those repealed or expired as those now in force, with a chronological list of them, and tables of their principal matters." This resolution led to the preparation of the edition entitled, "Statutes of the Realm, printed by command of His Majesty King George III., in pursuance of an address from the House of Commons of Great Britain, from original records and authentic manuscripts." This edition is in nine folio volumes, of which the first was published in 1810, and the last in 1822, and contains the Statutes from Henry III.'s Provisions of Merton (1235-6) to the last year of the reign of Queen Anne (1713). Prefixed to these Statutes, in the first volume, are prints of certain "charters of liberties," including Magna Charta, and an elaborate introduction, which, though superseded on some points by later researches, contains a large amount of interesting and valuable information on the history and condition of the English Statute Law. The introduction gives an account of the former printed collections, translations, and abridgments of the Statutes, and describes the various plans which had been proposed for an authentic publication or for a revision of the Statutes. Then, after a reference to the Charters, it describes the matters inserted in the collection of the Statutes, their arrangement, the sources from which they were taken, and the methods adopted in searching for, transcribing, collating, noting, and printing the text of the Statutes. The editors found much difficulty in determining what ought to be considered as Statutes; and the conclusion at which they ultimately arrived was to include in their edition "all such instruments as have been inserted in any general collection of Statutes printed previously to the edition by Hawkins" (published 1735), "with the addition only of such matters of a public nature, purporting to be Statutes, as were first introduced by him or by subsequent editors, and of such other new matters of the like nature as could be taken from sources of authority not to be controverted—namely, Statute Rolls, Inrollments of Acts, Exemplifications, Transcripts by Writ, and original Acts." Hence the first volume contains not only Royal enactments which are not, strictly speaking, Acts of Parliament, but sundry documents, of which both the authenticity and the claim to be considered as enactments at all are open to much doubt.[1] The Acts down

[1] See, *e.g.*, the remarks on the so-called Statute "De Officio Coronatoris," 4 Edw. I., in *Pollock and Maitland*, Book II., chap. ix., par. 4; and Gross, *Introduction to Select Coroners' Rolls* (Selden Society), p. 25.

to 1489, when the old practice of making up the Statute Roll ceased, are printed in double columns, one column containing the original Latin or Norman-French, the other the English translation, except that for the session of 1488-9 (4 Hen. VII.) both columns are in English, one printed from the Parliamentary Roll, the other from a different version contained in a book formerly kept in the Court of Exchequer at Westminster. The edition was supplemented by two index volumes. The first of these, which was published in 1824, and was called an alphabetical index, contains an alphabetical list of the subjects dealt with by the Statutes comprised in the nine volumes, giving, in connection with each subject, a short reference to the enactments dealing with it. The other, which was published in 1828, though called a chronological index, also proceeds on the basis of an alphabetical list of subjects, but gives under each subject-heading a list in chronological order of the enactments relating to it. It is really an expanded version of the alphabetical index.

Scottish Statutes.—In pursuance of a resolution passed by the Record Commission in 1807, a folio edition of the Scottish Statutes was prepared on lines resembling the English edition of the *Statutes of the Realm.* In order to give further time for consideration of the difficulties connected with the earlier Statutes, it was arranged that the first volume should be postponed. Accordingly, vols. 2 to 11, containing the Statutes from 1424 to 1707, the date of the union with England, were brought out in the years 1814 to 1824, whilst the first volume, containing documents of earlier date, did not appear until 1844.

Irish Statutes.—The Record Commission did not bring out any edition of the Irish Statutes, but an edition of them in twenty folio volumes had been previously printed by the King's Printer-General in Ireland, in pursuance of an order made by Lord Halifax in 1762, when he was Lord-Lieutenant of Ireland.

Editions of Statutes at Large for Period since 1713.—For the period since the reign of Queen Anne no collective edition of the English Statutes, containing repealed as well as unrepealed matter, has been published by authority. Of the editions brought out by private enterprise in the eighteenth century, the most important were those by Serjeant Hawkins (1734-5) and by Mr. Ruffhead (1762-4). These editions were regularly continued by subsequent volumes, and as they were printed from the King's Printers' copies of the Statutes their contents for the period since 1707 may be relied on as accurate; but they omit Statutes which are treated as of minor or transitory importance. Queen's Printers' copies of the nineteenth century Statutes have been published in many forms, and an octavo edition of the Acts of each session is now published by the Stationery Office within a reasonable time after the end of the session.

Chitty's "Statutes of Practical Utility."—The edition most commonly used by practising lawyers is Chitty's *Statutes of Practical Utility.* In this

edition all the Statutes which the profession are considered likely to want are printed with short notes, and are grouped under subjects which are alphabetically arranged. The latest edition, by J. M. Lely, is in thirteen octavo volumes, and is brought down to the end of 1895. A supplemental volume is published every year.

Statutes Revised (First Edition).—The object of the Statute Law Revision Acts which have been passed from 1861 onwards has been to purge away dead matter from the Statute Book, and thus to facilitate the preparation of an edition of the Statutes which should contain only such Acts as are in force. After three of these Acts had been passed, Lord Chancellor Cairns, in 1868, took active steps for the preparation of such an edition by the appointment of a Statute Law Committee to superintend the execution of the work. The result was the first revised edition of the Statutes, the first volume of which appeared in 1870, and which was carried in a series of eighteen quarto volumes down to the end of 1878.

Statutes Revised (Second Edition).—A second edition of the Revised Statutes was begun in 1886, and is to be carried, in sixteen octavo volumes, down to the end of that year. This edition is handier in form and cheaper than its predecessor,[1] embodies the effect of later Revision Acts, and contains in each volume not only a chronological list of the Acts passed in the period covered by the volume, showing how far they have been repealed, but also a full index to the enactments printed in the volume.

Utility of Statutes Revised.—As the utility of these revised editions has been questioned, it may be worth while to illustrate by a few figures the amount of cost and labour which they save. The first edition of the Revised Statutes substituted eighteen volumes for one hundred and eighteen.[2] The new edition contains, in five volumes, the enactments down to the beginning of the present reign, which occupied seventy-seven volumes of the Statutes at large. There are, indeed, two classes of persons whose needs the revised edition will not fully meet, and, it may be added, was not specially designed to meet. The judge who has to decide, the counsel who has to advise on the construction of an obscure enactment frequently finds it necessary to refer to the language of Acts, sections, or words which have been repealed, either as dead law, by Statute Law Revision Acts, or as superseded law, by amending or consolidating Acts. To the historical student the law of the past is even more important than the law of the present. Both these classes of persons require an edition of the Statutes containing everything that has been repealed, either by way of Statute Law revision or otherwise. But both these classes may derive material assistance from the notes and tables in the revised edition, which show the reasons

[1] The price of each volume is 7*s.* 6*d.*

[2] "After omission of repealed and expired Statutes to a vast amount, the present price of the last edition of the Statutes exceeds the average income of any individual of the labouring classes in England" (Bentham, *Works*, by Bowring, vol. iii., p. 239).

for each repeal or omission. And to the ordinary legislator, official, lawyer, or member of the public, it is surely an immense advantage to have an edition of the Statutes which contains only living law, which is comprised within a reasonable compass, and which may be purchased for a reasonable price.

Irish Statutes Revised.—A revised edition of the Ante-Union Irish Statutes, from 1710 to 1800, comprised in a single quarto volume, corresponding in form to the first revised edition of the English Statutes, was brought out under the authority of the Irish Government in 1888.

Projected Edition of Scottish Statutes Revised.—A revised edition of the Ante-Union Scottish Statutes is in course of preparation.

Annual Volumes of Public General Statutes.—The year 1886 was selected as the termination of the period for the Revised Statutes, because the existing edition of the Annual Statutes begins with the following year. Down to the year 1887 the Annual Statutes were printed and published in different forms and at different prices. But, as from the beginning of 1887, one authoritative edition only of the Statutes is published annually,[1] in an octavo volume, at a cheaper price than formerly, and is edited by an officer paid by the Treasury. Each volume contains an index to the public general Acts of the session to which it relates, and five tables—namely :

(1) A table of the titles of the public general Acts passed during the session, arranged in the order in which they were passed ;

(2) A table of the titles of the public Acts of a local character passed during the session which are placed among the local Acts ;

(3) A table of the titles of the local and private Acts passed during the session ;

(4) A table showing the effect of the year's legislation on public general Acts ; and

(5) A table of the local and private Acts arranged in classes.

Classification of Statutes.—The system of classification on which these tables are based dates from the year 1868. Under this system the Acts of each session are classified in three groups, each separately numbered :

1. Public General Acts.
2. Local Acts.
3. Private Acts.

The three groups are distinguished by different modes of numbering. Public General Acts have their chapters in Arabic characters (62 & 63 Vict., No. 10) ; Local Acts in small Roman numerals (62 & 63 Vict., No. x.) ; Private Acts (if printed) in italicised Arabic figures (62 & 63 Vict., No. *10*). The Local Acts of each session, including those which,

[1] The price of each volume of the Annual Statutes in the edition published by authority is three shillings. The Statutes published by the Council of Law Reporting are also printed in the same form by the Stationery Office.

though passed as public Acts, are treated as local, and on that ground excluded from the category of Public General Acts, are printed sessionally in separate volumes. Owing to their bulk and number, the local Acts of each session cannot usually be included in a single volume. Private Acts are not always printed; but a list of those passed in each session will be found in the "Table of the Local and Private Acts arranged in Classes," under the heading "Personal Affairs."

Public and Private Acts: Distinction.—The term "Private Act" in its narrowest sense means an Act belonging to the third of the groups mentioned above. Acts of this class are passed for purely personal objects, such as the extension of powers to deal with land subject to a particular settlement, and each of them contains a provision that it is not to be deemed public. They are now few in number, the necessity for most of them having been superseded by general legislation, such as that which has extended the powers of tenants for life to deal with land. In ordinary usage, however, the term "Private Act" is often employed in a wider sense, as including all measures introduced as private Bills. The former distinction merely affects the mode of promulgation and the arrangement of the contents of the Statute Book. A public Bill when passed may eventually be promulgated and printed as a local Act. But the distinction between public and private Bills is, as will be seen hereafter, much more important.

Every local Act is a public general Act. Before 1851 an enactment to this effect was contained in each local Act; but these special enactments were superseded in 1851 by a provision in Lord Brougham's Act, (13 & 14 Vict., c. 21,) which is now embodied in the Interpretation Act, 1889, (52 & 53 Vict., c. 63, s. 9.) Before 1798 the only distinction in the Statute Book was between public and private Acts. The latter class included not only Acts of a personal character, such as Estate Acts, Divorce Acts, and Naturalisation Acts, but also certain Acts which would be now treated as local—*e.g.* Drainage Acts and Inclosure Acts. But the great majority of the Acts now classed as local were then included among the public Acts. From 1798 to 1868 the Acts printed in the Statute Book were divided into public general Acts and local and personal Acts, according as they originated as public or private Bills. But since 1868, Acts which originate as public Bills, but are of a local character, are not promulgated as public Acts, and are printed among the local Acts.

Public and Private Bills: Distinction.—The distinction between public and private Bills is, as has been said, much more important. A private Bill is a measure for the interest of some person or class of persons, whether an individual, a corporation, or the inhabitants of a county, town, parish, or other locality, and originates on the petition of the person or persons interested.

A public Bill is introduced as a measure of public policy in which the

whole community is interested, and originates on the motion of some member of the House in which the Bill is introduced.

The object of a private Bill is, in fact, to obtain a privilegium,[1]—that is to say, an exception from the general law, or a provision for something which cannot be obtained by means of the general law, whether that general law is contained in a Statute or is Common Law.

Private and public Bills differ not merely in the mode of origination, but in the mode of procedure for passing them. In the case of a private Bill the rules of the Standing Orders of the two Houses as to the giving of certain notices and the deposit of Bills before a certain date must be complied with, in order that all persons may have notice if their private interests are affected. Each Bill is considered by a Select Committee of each House, who hear the promoters and opponents by counsel, consider their private interests, and determine, in a quasi-judicial capacity, whether the promoters of the Bill have justified their request for a privilegium, and whether private interests are properly protected.

The officers of the House and the different Government departments watch private Bills from the point of view of the public interest, and call the attention of the Select Committee to matters affecting that interest. The House of Commons have also appointed a special committee, to which Bills relating to town government are referred, for the purpose of guarding against the insertion of enactments inconsistent with the general law.

Subject to these provisions for the protection of public interests, the proceedings on a private Bill resemble more closely private litigation between the parties interested than a discussion on questions of public policy, though as each Bill has to go through the same stages in the whole House as a public Bill, there is an opportunity for members to raise at those stages questions of public policy in respect of the Bill.

Public Bills are considered mainly from the side of public policy. But when a public Bill affects private interests in such a manner that if it were a private Bill the Standing Orders would require notices to be given, it is called a hybrid Bill, and the practice is to refer the Bill to the examiners of Standing Orders like a private Bill, and to make the Bill proceed in nearly the same way as if it were a private Bill. For instance, it is considered by a select committee in a quasi-judicial capacity, and counsel are heard for and against it. Bills relating to Crown property must, if promoted by the Crown, be dealt with in this way, because the Crown cannot petition Parliament.

The boundary line between public Bills and private Bills, and between the private interests which require a public Bill to be treated as a hybrid Bill and those which do not, is very narrow, and has fluctuated from time

[1] As to the origin and early history of private Bills, see the interesting evidence given by Sir Francis Palgrave before the Select Committee on Public Petitions in 1832 (*H. C. Papers*, 1833, vol. xii., p. 171).

to time. Bills relating to particular localities only are, as a rule, treated as private Bills. But a Sunday Closing Bill for Wales and another for Cornwall were held to be rightly introduced as public Bills. Measures relating to the whole of London are frequently, perhaps usually, dealt with as public Bills, "the large area, the number of parishes, the vast population, and the variety of interests concerned constituting them measures of public policy rather than of local interest."[1] But the practice has not been uniform. The Metropolis Management Act, 1855, which was a public Act, gave certain powers to the Metropolitan Board of Works to borrow money. Other powers of borrowing money were given to that Board, partly by public Acts, like the Thames Embankment Act, 1862, partly by local Acts, dealing with local improvements. In 1869 a general Act regulated the Board's power of borrowing, and from that date till 1888 their powers of borrowing were given annually by a public Act. In 1889 the Standing Orders were altered, and the London County Council now have an annual Bill enabling them to borrow money.

In most towns the buildings and streets are regulated partly by local Acts and partly by the Public Health Acts. In London they have been regulated partly by local Acts—*e.g.* the Acts relating to the city, or Michælangelo Taylor's Act (50 Geo. III., c. lxxv.). But in 1844, and subsequently, they have been regulated by public Acts. In the session of 1894 a measure for consolidating the building law in London outside the city was introduced and passed as a private Bill, which became law as the London Building Act, 1894 (57 & 58 Vict., c. ccxiii.).

The Thames Conservancy was constituted partly by local Acts, partly by public Acts. In 1894 a Bill repealing all these Acts and reconstituting the Conservancy was passed as a private Bill, and became a local Act (57 & 58 Vict., c. clxxxvii.).

The general rule that where legislation deals with one particular locality only it ought to proceed by way of private Bill, is based on the view that the locality is entitled to be heard quasi-judicially on the provisions of the enactment. For this reason it is unusual to insert in a public Bill a clause dealing with a particular locality. Where, however, special provision for a particular locality has to be made, the rule is sometimes evaded by not naming the locality, but so stating the circumstances that the provision can only apply to the particular locality in question.

In some cases private Bills have been defeated by a resolution of the House that they ought to be dealt with as public Bills. Instances are supplied by the Manchester Education Bill, 1854, the Liverpool Licensing Bill, 1865, and the Keble College Bill, 1888. The Presbyterian Church of Ireland Bill, 1871, was introduced as a private Bill, but was withdrawn in consequence of an objection that the matter ought to be dealt with

[1] May's *Parliamentary Practice*, 10th ed., p. 634.

by public legislation; and a public Bill, which became law as the Irish Presbyterian Church Act, 1871 (34 & 35 Vict., c. 24), took its place.

A consideration of the different precedents and varying practice shows that the boundary line between public and private Bills depends not merely on whether the Bill comes within the Standing Orders relating to private Bills, or does or does not affect a particular locality only, but also on questions of policy, on the circumstances and political questions of the time, and on the general character of the Bill. On the one hand, it would not be right that a measure required by the general public interest on general grounds of public policy should not be passed merely because it is objected to by particular persons or localities whom it would affect. On the other hand, it would not be right that a particular person or locality should be allowed to obtain any privilegium inconsistent with what is considered at the time to be true public policy. In some cases it may be convenient that a municipality should be authorised by private Bill to try a particular experiment which is not inconsistent with general public policy. If the experiment is successful, it may be afterwards adopted as a matter of general legislation. Again, there may be cases where the general law will not meet the circumstances of a particular locality. Thus, a law suitable to the great majority of towns may be found inapplicable to the large populations of such places as Liverpool or Glasgow.

It seems therefore impossible to lay down a hard and fast rule as to the subjects which should and which should not be dealt with by private Bills. Certain principles should be observed, such as that a private Bill should not, except for very strong reasons, deal with certain subjects, including the public revenue, the administration of justice, or the constitution or election of local governing bodies. But the boundary line will vary, and ought to vary, from time to time. Circumstances and the requirements of localities change. Old needs pass away and new needs arise. If experiments by private Bills had not been allowed, some of our public legislation would not have taken place. Of course these experiments ought to be carefully watched, and probably there ought to be some special machinery such as the Select Committee now appointed annually by the House of Commons on Police and Sanitary Regulation Bills, for the purpose of determining the cases in which they should be allowed.

As has been said above, experiments in private legislation have often led to public legislation. A good instance is supplied by the Public Health Acts Amendment Act, 1890 (53 & 54 Vict., c. 59), which enables any sanitary authority to adopt various enactments which had been frequently embodied in measures introduced as private Bills.

A very large number of matters which used to be dealt with by private legislation can now be dealt with under the general law. Thus, the Divorce and Naturalisation Acts, which were so common in the last century, are now superseded in most cases by general enactments. Most of the Estate Acts

have been made unnecessary by such Acts as the Settled Land Acts, 1882 to 1890. Amendments of the general company law have removed the necessity for much special legislation about companies, and many matters for which private Bills were formerly required can now be dealt with by the machinery of Provisional Orders.

Provisional Orders' Confirmation Bills.—The Bills to confirm the numerous Provisional Orders now made, under statutory authority, by the Local Government Board, the Board of Trade, and other Government departments, are introduced as public Bills by the Minister in charge of the department which made the order, are referred to the examiners for consideration, and if any of the orders scheduled for confirmation is opposed, it is treated as a private Bill for the purpose of investigation in committee.[1]

Public Acts of a Local Character.—Acts to confirm Provisional Orders, and other Acts which, though introduced as public Bills, are considered to be of a local character, are, as a rule, included in the group of local Acts, but distinguished by having the letter "P" prefixed to their number in the group. To this class belong the Acts which are occasionally passed to remove doubts as to the validity of marriages celebrated in particular places of worship.

Chronological Table and Index of Acts.—A chronological table and index of the Statutes is published annually under the direction of the Statute Law Committee. In its latest form this work consists of two volumes, which are arranged for combined use. The first volume contains a chronological table of all the Statutes, showing total or partial repeals; the second contains an index to the subject-matter of the Statutes in force. The chronological table is based on the edition of the Record Commission, known as the *Statutes of the Realm*, as far as that edition extends—namely, to the end of the reign of Queen Anne (1713). Thenceforward it follows Ruffhead's edition (by Serjeant Runnington, 1786) so far as it extends—namely, to the end of the session 25 Geo. III., 1785. From that date, it is believed, all editions are alike. The following extract from the preface to the fifteenth edition shows the principle on which particular classes of Statutes have been included in or excluded from the chronological table:

"The chronological table covers the whole period between the passing of the earliest Statute of the Parliament of England (1235) and the end of the fifth session of the Twenty-sixth Parliament of the United Kingdom of Great Britain and Ireland—namely, the session 62 & 63 Vict., 1899. Ante-Union Acts of the Parliaments of Scotland and Ireland are not comprised in the table. Acts of the Parliament of England extended to Ireland by Poynings' Act, 10 Hen. VII., c. 22 (I), are, in relation to Ireland, treated as Ante-Union Acts of the Parliament of Ireland, with the exception that the repeals of such enactments by the Statute Law Revision (Ireland) Act, 1872, are noted.

"The chronological table comprises all Acts printed in the *Statutes of the*

[1] Standing Orders, House of Commons, 72, 208A, Clifford, vol. i., p. 270.

Realm, and after the end of that edition all Acts printed by the King's or Queen's Printers as public or as public general.

"Many of these Acts, however, cannot be regarded as public Acts, affecting the community generally, being in their nature special or private Acts, relating to particular persons or places or to private concerns. Acts of this kind are distinguished by the italic entries *Local*, *Personal*, *Private*, in the second column of the table (except in a few cases in which they are shown to be not in force); and the table does not profess to show repeals affecting these Acts. Further means of reference to the provisions of these Acts is afforded by the indexes to the local and personal Acts compiled by order of the Select Committee on the Library of the House of Lords, which cover the period 1801 to 1887, and by the classified lists of local Acts annexed to the annual volumes of the Statutes. The second volume of the chronological table gives, as regards all Acts of a public nature, wholly or partly in force, the titles of subject matters under which they are to be found in the 'Index to the Statutes in Force'; and as regards Acts spent or repealed, gives in italic type either the short title of the repealed Act or a general indication of its subject matter."

The index is framed in accordance with instructions prepared by Lord Thring in 1876. It is followed by a series of appendices containing references to various Acts, mainly of a local character, which were printed among the public or public general Acts, but which, for various reasons, it has been considered undesirable to index in detail.

Lists of Local and Private Acts.—Local and private Acts have not been indexed in the same manner or to the same extent as public general Acts. Until 1798 local Acts were not numbered or printed separately from general Acts. It is estimated that the number of Acts of a local, personal, or private character passed before the present century is upwards of eleven thousand, and that upwards of twenty-one thousand Acts of a similar character have been passed during the present century. In 1867 an index, or rather a classified list, of Statutes passed between 1801 and 1865, was published by order of the House of Lords, but is now out of print. It was divided into two parts, the first containing public general Acts, and the second local and private Acts. The second part has been supplemented by additional volumes published in 1878 and 1890. A classified list of all the local and private Acts (including Provisional Orders confirmed by Local Acts) from 1801 to 1899 is now in course of preparation under the direction of the Statute Law Committee.

MODES OF LEGISLATION IN THE BRITISH COLONIES.

(Being answers to a series of questions addressed by the late Lord Herschell—the then President of the Society—to the Secretary of State for the Colonies, to obtain information respecting the common and statute law of the several colonies, the methods of legislation, the publication revision, and consolidation of statute law and matters connected therewith: see Vol. I., New Series, p. 70).

(*a*) CYPRUS.

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I.—Common Law as the Basis of Statute Law.

(*a*) *What is the Common Law of the colony? Under what circumstances was it introduced?*

The Common Law in Cyprus, so far as any system of Common Law may be said to exist in the island, is the Common Law of the Ottoman Empire, which is based upon the Sheri or Mohammedan Sacred Law.

The principles of the Mohammedan Common Law, as recognised in the Ottoman Empire, are collected in the Mejélé, or Civil Code, which was compiled by a committee of Turkish jurists in 1869.

The Mejélé, in interpreting the Sacred Law, in most respects follows what is known as the Hanifite tradition.

Mohammedan Law was introduced on the conquest of the island by the Turks in 1571.

(*b*) *Is there any law applying exclusively to particular races or creeds?*

English Law, which is defined by the Cyprus Courts of Justice Order, 1882, to mean "The Common Law, the Rules of Equity, and the Statutes of General Application which were in force in England on the 21st day of December, 1878," as from time to time altered or modified by Cyprus Statute Law, is applied—

(*a*) in civil actions where the defendant or any defendant is not an Ottoman subject, and

(*b*) in criminal matters where the person accused is not an Ottoman subject,

except (1) where the parties agree that their rights are to be determined by Ottoman Law; (2) where it is apparent that the parties intended their

rights to be determined by Ottoman Law; (3) where by any Ottoman Law in force on July 13th, 1878, it is expressly enacted that every person, whether of Ottoman nationality or not, shall be subject to the provisions thereof; (4) in actions relating to immovable property where the rights of the parties are regulated by Ottoman Law as modified or varied by Cyprus Statute Law.

The Mohammedan Sacred Law is applied by the tribunals known as Mekheme-i-Sherié in religious matters concerning persons of the Mohammedan faith. In practice the jurisdiction of these Courts principally consists of matrimonial causes and the administration of the estates of Mohammedans under disability.

The Archbishop of Cyprus has jurisdiction in matrimonial causes concerning persons belonging to the orthodox Eastern Church, and the validity of divorces granted by the archbishop in such matters is recognised in the civil tribunals.

II.—Statute Law.

(*a*) *Of what does the Statutory or Enacted Law of the colony consist? To what extent is it embodied in Charters, Regulations, Orders in Council, Ordinances, or Acts?*

The Statute Law of the island consists—

(1) of the legislative enactments of the Sublime Porte so far as these were in force in Cyprus on July 13th, 1878.

These enactments are collected in the Turkish work known as the *Destour*, the greater part of which is to be found in a French translation known as the *Legislation Ottomane*, by Aristarchi Bey, and in the modern Greek translation of Demetrius Nikolaides.

In point of form Ottoman legislation may be divided into Charters (such as the Khatti-Sherif and the Khatti-Humayoun), Laws, Firmans, Regulations, and Vezirial Orders and Instructions, all of which derive their authority from the Sovereign, and are equally binding.

(2) Of Ordinances and Laws passed since the British occupation of the island.

From the British occupation to the alteration in the constitution of the Legislative Council which was effected by Her Majesty's Order in Council of November 13th, 1882, the legislation of the island is embodied in Ordinances.

The enactments passed after the new Legislative Council came into existence in July, 1883, are embodied in Laws.

(3) Of Orders of Her Majesty in Council.

The constitution of the Legislative Council, the jurisdiction of the Courts, extradition, and certain other matters are regulated by Orders of the Queen in Council.

(4) Instructions under the Royal Sign Manual and Signet to the High

Commissioner with regard to the transaction of business and the passing of Laws in the Legislative Council.

(*b*) *To what extent do the Statutes of the United Kingdom operate in the colony by virtue of either—*

(i) *Original extension of English Law to the colony;*

(ii) *Express provisions of any Order in Council or Charter; or*

(iii) *Express adoption by the Legislature of the colony?*

(i) The extent to which English Law is in force in Cyprus has already been pointed out.

(ii) Except as stated above, the Statutes of the United Kingdom do not operate in the island by virtue of express provisions of any Order in Council or Charter, nor

(iii) By express adoption by the Legislature of the colony.

(*c*) *Is the Statute Law of any other colony in force in the colony?*

No.

(*d*) *Is there any code or other body of Enacted Law of non-British origin in force in the colony?*

As previously pointed out, the Ottoman Law, as it existed in Cyprus on July 13th, 1878, is in force except in certain special cases which are governed by English Law. The Ottoman Law contains the following codes:

(*a*) The Mejélé, or Civil Code.

(*b*) The Land Code, based on principles of Mohammedan Law.

(*c*) The Penal Code, based on the Code Napoléon.

(*d*) The Commercial Law, which includes the law relating to partnership, bills of exchange, bankruptcy, merchant-shipping, and marine insurance, and is based on the French Commercial Code.

III.—Methods of Legislation.

(*a*) *By whom are drafts of legislative measures prepared? Is there any official draftsman? If so, by whom is he appointed? To whom is he responsible? and what are his staff and duties? Do his duties extend to measures introduced by private or non-official members of the legislative body?*

There is no official draftsman. The Queen's Advocate, who is appointed by the Crown, drafts measures introduced by the Government.

His staff consists of a clerk and interpreter. He is *ex-officio* a member of the Executive and Legislative Councils, and is the legal adviser to the Government. He represents the Crown in the Assize Courts and in the more important civil and criminal proceedings to which the Government is a party.

As a matter of convenience, the Queen's Advocate generally revises measures introduced by non-official members, but it forms no part of his duty to do so.

(*b*) *What is the constitution of the legislative chamber or chambers through*

which measures have to pass? If there are two chambers, may measures be introduced in either?

There is only one legislative chamber, known as the Legislative Council, through which legislative measures have to pass.

The Legislative Council consists of the High Commissioner and eighteen members, of whom twelve are elective and six non-elective. Of the twelve elected members, three are elected by Mohammedan and nine by non-Mohammedan voters.

The six non-elective members are such holders of public offices in the island as may from time to time be designated by Instructions under Her Majesty's Sign Manual and Signet or through one of her principal Secretaries of State. These non-elective members hold their places in Council during Her Majesty's pleasure, and may be suspended from the exercise of their functions as members by the High Commissioner.

The officers named as non-elective members by the Royal Instructions of December 14th, 1882, are the Chief Secretary, the Queen's Advocate, and the Receiver-General, and three other holders of public offices, to be appointed by Instruction or warrant under the Royal Sign Manual and Signet or through a principal Secretary of State.

(*c*) *Are draft measures published before introduction or before any other stage? If so, under what rules?*

Under the Royal Instructions of December 14th, 1882, drafts of all Laws intended to be introduced are required, except in cases of urgency, to be published for general information in the *Official Gazette* a reasonable time before their introduction.

(*d*) *Through what stages does a Bill pass before it becomes law?*

A Bill passes through three stages: (1) The first reading. At the conclusion of the discussion on the introduction of the Bill the chairman puts the question "that the Bill be now read." (2) Committee. If the motion for the first reading is carried, the Council resolves itself into a committee for the consideration of the several clauses of the Bill. (3) After the several clauses of the Bill have been passed in committee, the Council resumes, and the chairman puts the question "that this Bill do now pass."

After a Bill has passed the Council it is open for the High Commissioner to declare his assent (in which case the Bill becomes law), to refuse his assent, or to reserve the Bill for the signification of Her Majesty's pleasure.

The Order of the Queen in Council of November 30th, 1882, reserves to Her Majesty a power to disallow in the whole or in part any Laws passed by the High Commissioner with the advice and consent of the Legislative Council.

(*e*) *Is any opportunity afforded for referring measures, while in course of passage through the Legislature, to any special officer or committee on points of form?*

No opportunity is afforded for referring measures while in course of passage through the Legislature to any special officer.

A Bill, at any time after the motion for the first reading has passed, may be referred to a Select Committee, which reports to the Council.

(*f*) *Have any steps been taken to secure uniformity of language, style, or arrangement of Statutes either by means of a measure corresponding to "Brougham's" Act,* 13 & 14 *Vict., No.* 21, *or to the Interpretation Act,* 1889, 52 & 53 *Vict., No.* 63, *or by official instruction or otherwise?*

There is a local Ordinance (III., 1879) for defining certain terms in Ordinances and Rules of Court which is to some extent based on Brougham's Act.

The Royal Instructions of December 14th, 1882, contain directions as to the form of the enacting words and the general arrangement and form to be adopted in preparing Laws.

(*g*) *Is there an annual session of the Legislature? Are there any fixed or customary periods of sessions?*

The Order in Council of November 30th, 1882, requires a session of the Council to be held once in each year, and so that a period of twelve months does not intervene between the last sitting of one session and the first sitting of the next session.

The session generally opens in February or March, and continues for about four months.

(*h*) *How are the Acts or Ordinances of the colony numbered? Are they numbered by reference to the calendar year or to the regnal year or in any other way? Is it the practice to confer for convenience a "short title" on each Act or Ordinance? How long has this practice been followed?*

The Ordinances and Laws of the island are numbered by reference to the calendar year.

It has been the practice from the British occupation of the island to confer a "short title" upon Ordinances and Laws.

(*i*) *Are Private Bills (if any) treated separately and under different conditions from Public Bills? On what principle is the line drawn between Public and Private Bills? Are Private Acts or Ordinances separately numbered?*

There is no distinction made between Public and Private Bills.

(*j*) *Does any practice exist of accompanying a measure on its introduction by an explanatory memorandum?*

There is no such practice. The mover of the first reading of a Bill usually explains its scope and object and the circumstance which led to its introduction.

It is the duty of the Queen's Advocate to report on each Law of the session, and to advise whether the measure is one to which the High Commissioner may properly consent in the name and on behalf of Her Majesty, or whether the Bill should be reserved for the signification of Her Majesty's pleasure.

IV.—Publication of Statutes.

(*a*) *In what manner and under what authority are Stututes promulgated? What evidence is accepted of a Statute having been duly passed?*

Laws to which the High Commissioner has assented in the name of Her Majesty, and Laws which have been allowed by Her Majesty, are published in the *Official Gazette*.

(*b*) *In what form or forms, and under what authority, are Statutes printed for publication?*

(*c*) *Are the Statutes of each Session published in a connected form at the end of the session?*

At the commencement of each year the High Commissioner causes a complete collection to be published, for general information, of all Laws enacted during the preceding year.

(*d*) *Are the periodical volumes of Statutes accompanied by* (1) *an index and table of contents*, (2) *a table showing the effect on previous legislation?*

These volumes contain a table of contents, but neither an index nor a table showing the effect on previous legislation.

(*e*) *What collective editions (if any) of the Statute Law of the colony have been published, and whether by Government or private enterprise? Are any of them periodical? Do such editions comprise the Acts of the United Kingdom in force in the colony?*

No such collective edition has been published.

(*f*) *Is there any edition of "Selected Statutes" corresponding to Chitty's "Statutes of Practical Utility"?*

There is no edition of Selected Laws of the island.

(*g*) *How are the Private Acts published?*

There is no distinction between Public and Private Laws.

V.—Revision of Statutes.

(*a*) *Have any steps been taken for the revision and expurgation of the Statute Law, whether periodically or otherwise? What machinery (if any) exists for this purpose?*

No steps have been taken for a revision and expurgation of Statutes periodically or otherwise.

(*b*) *Is there any edition of the "Revised Statutes" showing those actually in force? If so, under what authority is it prepared and published, and what is the date of the latest edition? Is it published at periodical intervals, or how otherwise? Are the contents arranged alphabetically, chronologically, or on any other principle?*

There is no such edition in force in the island.

VI.—Indexing of Statute Law.

Is there any general index to the Statute Law of the colony? If so, on what principle is it arranged, and after what interval is it revised? Does it include both Public and Private Acts or Ordinances and the Statutes of the United Kingdom which are in force in the colony? Is it accompanied by any general table showing how each Statute has been dealt with? What is the date of the latest edition?

There is no authoritative index to the Statute Law of the island. An index of the Ordinances and Laws of the island was published in 1896 by the late Major Seager, President of the District Court of Larnaca: it is alphabetically arranged.

VII.—Consolidation and Codification.

(*a*) *What steps have been taken to consolidate the whole or particular parts of the Statute Law or to codify any branches of the Law? Does any machinery exist for the purpose? Is the work now in progress?*

No steps have been taken towards a general consolidation of Statute Law; but particular portions of the Law, such as that relating to the administration of infants' estates, have been consolidated.

No portion of the Statute Law which has been enacted since the British occupation has been codified.

Codes of Criminal Law and Procedure have been drafted by Sir W. J. Smith, the late Chief Justice of the island, but have not yet become law.

No machinery exists for consolidation or codification.

(*b*) *What "codes" are now in force in the colony? When and by whom were they prepared, and on what materials are they based?*

The only codes in force in the island are the Turkish Codes, which have previously been described.

VIII.—Subordinate Legislation.

What official or other machinery exists for the preparation, passing, or promulgation of measures of subordinate legislation, such as rules or orders made by the Government or a Minister or Department under the express authority of Statute or Ordinance? Is there any, and what, collection of or index to such subordinate measures?

Various Laws authorise the making of rules (1) by the High Commissioner, (2) by the High Commissioner in Council, (3) the High Commissioner with the advice and assistance of the Chief Justice, and (4) by local and other authorities, subject to the approval of the High Commissioner.

There is no collection of or index to such rules.

(*b*) VICTORIA.

The Governor of Victoria, Lord Brassey, has been good enough to forward the inclosed memorandum with respect to the methods of legislation in Victoria.

Crown Law Offices, Melbourne.
August 21st, 1899.

I.—Common Law as the Basis of Statute Law.

As a colony originally founded by British subjects, the Common Law of England is also the Common Law of Victoria (see Tarring, *Law Relating to the Colonies*, 2nd Ed., p. 6; Webb, *Imperial Law*, 2nd Ed., p. 4, and authorities there cited).

There is no law in Victoria applying exclusively to particular races or creeds, in the sense in which the enquiry appears to be framed. Special provisions exist as to the immigration of Chinese, and as to their conditions of labour under the Factories Acts.

II.—Statute Law.

The statutory or enacted law of the colony consists of—

(*a*) Acts of the Legislative Council of Victoria from 1850 to 1855, and Acts of the Parliament of Victoria from 1856 to the present time.

(*b*) Acts of the Imperial Parliament in force by virtue of the provisions of the Act 9, Geo. IV., No. 83, s. 24, which enacts that "all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith or with any charter or letters patent or Order in Council which may be issued in pursuance hereof) shall be applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively so far as they can be applied within the said colonies."

(*c*) Legislation of the Imperial Parliament enacted since the passing of the above-mentioned Act, and intended to apply to the Empire generally.

(*d*) Acts and Ordinances of the Legislative Council of New South Wales in force at the time of the separation of Victoria from the colony, and still unrepealed (see Act 13 & 14 Vict., No. 59, s. 25).

III.—Methods of Legislation.

(*a*) Measures for submission to Parliament are prepared by the parliamentary draftsman under the directions of Ministers. The parliamentary draftsman is an officer of the public service appointed by the Governor in

Council, and attached to the Department of the Attorney-General, to whom he is directly responsible. His duties are to prepare all Government Bills and draft amendments therein. He also, when desired, drafts Bills for private members, and as a general rule all such Bills, by whomsoever drafted, are examined by him, and, when necessary, specially submitted to the Attorney-General or the Premier for his consideration.

(*b*) The Victorian Legislature consists of the Queen by her representative, the Legislative Council, and the Legislative Assembly established by the Constitution Act (Schedule 1 to the Imperial Act, 18 & 19 Vict., No. 55). The Legislature is designated "The Parliament of Victoria" (Act No. 1075, s. 9). Measures may be introduced in either House, but the great bulk of Government measures are introduced in the Legislative Assembly. S. 56 of the Constitution Act provides that all Bills for appropriating any part of the revenue of Victoria and for imposing any duty, rate, tax, rent, return, or impost shall originate in the Assembly, and may be rejected, but not altered, by the Council.

(*c*) Draft measures are not published before introduction, but all Bills are circulated to members between their first and second readings.

(*d*) The procedure on Bills conforms as closely as practicable to the practice of the Imperial Parliament. They are read three times in each House, and are discussed in detail in committee of the whole House.

(*e*) There is no special machinery for referring measures, while in course of passage through the Legislature, to any special officer or committee on points of form, but measures are sometimes referred to a committee of either House for consideration.

(*f*) Since 1857 Victoria has had an Interpretation Act (21 Vict., No. 32) similar in character to the Act 13 & 14 Vict., No. 21. Upon the consolidation of the Statutes in 1890 the opportunity was taken to introduce the Interpretation Act, 1890, No. 1058, which embodies certain additional provisions contained in the Imperial Interpretation Act, 1889. Uniformity in language, style, and arrangement is further secured by the fact that all Bills, as already explained, pass through the hands of one official—the parliamentary draftsman.

(*g*) An annual session of the Victorian Parliament is provided for by the Constitution Act, s. 29. As a rule the Houses meet in May or June, and prorogue before Christmas; but the session occasionally extends into the new year.

(*h*) S. 13 of the Act No. 22 (now s. 19 of No. 1058) provides that the Acts of the Parliament of Victoria shall be numbered in regular arithmetical series, and that it shall be sufficient to cite any such Act by the number alone, without setting out the title thereof, or the year of our Lord, or of the reign in which the same shall have been passed.

It has been the usual practice, ever since the introduction of Parliamentary Government, to confer a short title on each Act.

(*i*) Private Bills are introduced only in the Legislative Assembly. The practice of the House with regard to such Bills is substantially the same as that of the House of Commons. The Standing Orders provide that no private Bill shall be brought into the House but upon a petition first presented, which shall be duly deposited with the Clerk of the Assembly and endorsed by the examiners of petitions for private Bills, with a printed copy of the proposed Bill annexed; and such petition shall be signed by the parties or some of them who are suitors for the Bill.

Bills dealing with the following subjects are treated as private Bills:

Charters and corporations, enlarging or altering powers of. City or town, paving, lighting, watching, cleansing, or improving of. Company-incorporating, regulating or giving powers to. Charitable or public purposes, property held in trust for. Church or corporation property, or property held in trust for public or charitable purposes, where no work is to be executed. Ferry. Gas-works. Market or market-place, erecting, improving, repairing, maintaining, or regulating. Powers to sue and be sued, conferring. Continuing or amending an Act passed for any purpose included herein where no further work than such as was authorised by a former Act is proposed to be made. Making, maintaining, varying, extending, or enlarging any aqueduct, archway, bridge, canal, cut, dock, ferry, where any work is to be executed, harbour navigation, pier, port, railway, reservoir, sewer, street, tramway, tunnel, turnpike or other public carriage-road, waterwork.

In numbering Acts no distinction is made between public and private Acts.

(*j*) It is the usual practice to accompany a Bill with an explanatory memorandum, whenever the nature of the measure seems to require it.

IV.—Publication of Statutes.

(*a*) All Acts are printed and issued to the public by the Government printer. They are also issued as supplements to the Government *Gazette*, and circulated gratuitously with it to a very large number of Government officials, local governing bodies, and public institutions throughout the colony.

S. 26 of the Evidence Act, 1890, makes all copies of the votes and proceedings of either House of Legislature, if purporting to be printed by the Government printer, admissible as evidence, without proof being given that the copies were so printed.

(*b*) The Statutes of each session are published in one volume at the end of each session. This volume is accompanied by a table of contents, but not by an index or table showing the effect on previous legislation. It has, however, been the practice during the last few years to publish at the end of each sessional volume an alphabetical index to Acts passed since the consolidation of 1890. This serves as a useful guide to amending legislation. The latest sessional volume also contains a chronological table of the

Victorian Statutes, 1890, and all subsequent Acts, showing how those Acts have been affected by later legislation.

(*c*) Collected editions of the Statutes of Victoria have been published at intervals of about ten years ever since the separate existence of the colony. They have all been issued under the direct supervision of the Government, but they have not been published at regular intervals. The last publication of this nature was on the occasion of the consolidation of the Victorian Statutes in 1890, to which reference is made below. In this edition one volume is chiefly devoted to the Acts of the Imperial Parliament believed to be in force in Victoria.

(*d*) An edition of the Statutes, on the lines of Chitty's *Statutes of Practical Utility*, has recently been published by Mr. Louis Horwitz, a barrister and solicitor of the colony. This edition shows all the amendments made in the various Acts up to the time of the issue of the work.

(*e*) Private Acts are published annually in the sessional volumes in precisely the same way as public Acts, with which, as previously mentioned, they are numbered consecutively.

In the edition of 1890 one volume is devoted to Acts of a private nature.

V.—Revision of Statutes.

The whole of the Victorian Statutes were consolidated in 1890 under the personal supervision of the late Chief Justice Higinbotham. A complete edition of the Statute Law of Victoria was then issued in seven volumes, of which the first five contained the consolidated Acts; the sixth, Acts of a private character; and the seventh, Acts of the Federal Council of Australasia, and Acts of the Imperial Parliament believed to be in force in Victoria. This edition was intended to form part of a scheme which was suggested to Parliament by the Council of the Judges in their annual report in 1887 for the periodical consolidation and publication of the Statutes. The suggestion was referred to a committee of both Houses, which in November, 1889, reported favourably to the project of consolidation, and recommended that a fresh consolidation and publication should take place every ten years.

During the session of 1890 the whole of the consolidated Acts, which had been prepared by the late Chief Justice with the assistance of two members of the Bar, were passed into law.

In the course of consolidation all matter clearly repealed (with the exception of some sections in the Constitutional Act) was omitted.

In accordance with the suggestion of the Council of the Judges, notes upon decisions were made a feature of this publication.

The consolidated Acts are arranged alphabetically and numbered consecutively. An explanatory paper and historical table of legislation are prefixed to the first volume.

VI.—Indexing of Statutes.

(*a*) Each of the periodical collections of Statutes was accompanied by a general index. The fifth volume of the edition of 1890 contains a complete index to the consolidated Acts. It is arranged on the same principle as the index to an ordinary text-book. The volumes of private Acts and Acts of the Imperial Legislature have each a separate index.

(*b*) The historical table of legislation referred to in the preceding paragraph gives detailed information as to how each Statute has been dealt with.

VII.—Consolidation and Codification.

(*a*) The subject of consolidation has been fully dealt with under V, *supra.*

(*b*) A general codification of the law of Victoria was prepared by the late Dr. Hearn, Dean of the Faculty of Law in the University of Melbourne, and a member of the Legislative Council.

In 1884 a Bill embodying the main features of this codification was passed by the Legislative Council, but subsequently lapsed. In 1887 the code was referred to a Joint Committee of the two Houses, which took the evidence of some of the judges and leading lawyers as to the advisability of adopting it. The late Chief Justice Higinbotham and Mr. Justice Webb, amongst others, expressed themselves as favourable to its adoption.

In 1888 the code was again referred to a Select Committee of the two Houses; but although the Chief Justice again expressed himself as favourable to its adoption, there was a large body of testimony the other way. The committee ultimately reported that the Bill contained too many inaccuracies to be adopted in the form proposed, and they recommended its submission to the best available counsel for revision and correction.

Since then nothing has been done in the direction of a general codification of the law; but the Imperial Bills of Exchange Act, 1882, the Partnership Act, 1890, and the Sale of Goods Act, 1893, which are codifications of the law relating to the subjects with which they severally deal, have been adopted in Victoria.

VIII.—Subordinate Legislation.

Measures of subordinate legislation, such as Rules and Orders in Council, are usually prepared in the Department of the Minister administering the Act by virtue of which they are made, though they are frequently prepared or revised by the Crown Solicitor. They are generally published in the Government *Gazette.* There is no complete edition of or index to them. In the edition of the Acts of 1890 a large number of the rules of a more important and permanent character are appended to the Acts to which they belong.

(*c*) CEYLON.

[*Contributed by* C. P. Layard, Esq., *Attorney-General of Ceylon.*

I.—Common Law.

(*a*) The Common Law of the island is the Roman-Dutch Law. It was introduced into the Maritime Provinces of the island by the Dutch Government; and by the Proclamation of September 23rd, 1799, the laws and institutions which subsisted under the late Dutch Government were continued in force under the British Government.

(*b*) (1) The inhabitants of the Kandyan Provinces (the Central Provinces of the island) retain their civil rights and immunities according to the laws, institutions, and customs established and in force among them at the date of their occupation by the British in 1815; but when there is no Kandyan law or custom having the force of law applicable to the decision of any question arising for adjudication, the Roman-Dutch Law is made applicable for the determination of that question by Ordinance No. 5 of 1852.

(2) The Teswalamai, or customary law of the Malabars of Jaffna, as promulgated by the Dutch Government in the year 1707 and referred to in the British Regulation, No. 18, of December 9th, 1806, is in force in the district of Jaffna, a portion of the Northern Province of the island, and in Batticaloa in the Eastern Province of the island, as regards Malabars.

(3) The Mohammedans, whose customs were codified and promulgated by authority of the British Government on August 5th, 1806. This code refers to matters of succession, rights of inheritance, and matrimonial affairs.

II.—Statute Law.

(*a*) The Statute Law of the island includes Acts of Parliament applicable to the island, Royal Charters, Letters Patent under the Great Seal, Instructions by the Crown to the Governor, Minutes of Council, Proclamations, Regulations, and Ordinances.

The first local legislation was by proclamation under the authority of the British Governor. In 1802 a change in the constitution of the Governor's Council took place, and Proclamations were subsequently issued by "Order of Council" and signed by the Secretary to the Council.

Proclamations were now and then published in the form of "Instructions." From 1805 legislative Acts were passed under the name of Regulations. They were enacted by the Governor in Council. In 1833, however, the legislative power was taken from the Governor's Council and given to a Legislative Council.

(*b*) The Statutes of the United Kingdom do not operate in the island by virtue of original extension of English Law to the island. Imperial Acts, which by express provision or necessary intendment are applicable to

all Her Majesty's dominions, and Imperial Acts which are applicable to all the colonies, operate in the island. In respect of maritime matters and commercial matters, the Ordinances No. 5 of 1852 and No. 22 of 1866 enact that the English Law should prevail, and thereby the English Statutory Law applicable to those matters has been held to operate in the island.

(*c*) The Statute Law of no other colony is in force in the island.

(*d*) No code or other body of enacted law of non-British origin is in force in the island.

III.—Methods of Legislation.

(*a*) Drafts of legislative measures are prepared by the Attorney-General.

Private or non-official members of Council have seldom introduced measures into Council. The Attorney-General has nothing to do with the drafting of such measures.

(*b*) The Legislative Council, as constituted by Letters Patent dated June 16th, 1877, and Instructions from time to time issued addressed to the Governor of the island under Her Majesty's Sign Manual, consists of official and unofficial members. The official members are the Lieutenant-Governor, if any, of the island, the senior officer for the time being in command of Her Majesty's troops, if not below the rank of captain, the persons discharging the functions of Colonial Secretary, Attorney-General, Auditor-General, Colonial Treasurer, Government Agent for the Western Province, Government Agent for the Central Province, and two other persons holding office in the island, as may from time to time be appointed by Her Majesty; whilst the unofficial members, whose number can at no time exceed eight, are appointed by the Governor subject to Her Majesty's confirmation or disallowance.

(*c*) Draft measures are usually published, before being introduced into Council, in the Government *Gazette*, but there is no provision of the law nor any rule requiring such publication. Under the Rules and Orders of the Council every measure must be published in at least two consecutive copies of the Government *Gazette*. Before it is committed and printed, copies of it must be sent by the Clerk of the Council to each member three days at least prior to the first reading.

(*d*) The stages a measure passes through are—

(1) First reading.
(2) Second reading.
(3) Committee.
(4) Third reading.

Any member desiring to introduce a measure other than a Government one must by the Rules and Orders of the Council obtain leave from Council to do so.

(*e*) The Rules and Orders provide that all measures, after having passed through the committee stage, shall be referred to the law officers of the

Crown (the Attorney-General and Solicitor-General) for their opinion—first, whether if a law were framed in the terms of the draft referred there would be any legal impediment to its execution by the colonial tribunals; and secondly, if so, by what means, if any, that impediment can be most conveniently surmounted.

(*f*) The Royal Instructions to the Governor provide that all measures shall be styled Ordinances, and that the enacting words shall be "enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof," and that Ordinances are to be numbered and methodically arranged, different subjects are not to be mixed in the same Ordinance, and no clause is to be introduced foreign to what the title of such Ordinance imports. The Ordinance No. 1 of 1852 further makes provision for shortening the language used in Ordinances.

(*g*) There is an annual session of the Legislature. It is customary to open the session two or three months before the end of the year, and to close it shortly before the commencement of the next session.

(*h*) The Ordinances are distinguished by titles, and the Ordinances of each year are distinguished by consecutive numbers commencing in each year with the number one. It is customary to confer on each Ordinance for convenience of citation a "short title." This custom has been in existence for over forty years.

(*i*) There are no Private Bills.

(*j*) The practice of accompanying an Ordinance by an explanatory memorandum on its introduction does not exist.

IV.—Publication of Statutes.

(*a*) Promulgation of the Ordinance is effected by publication in the Government *Gazette* and by the enrolment of a duly authenticated copy of the Ordinance in the Supreme Court. The production of the Government *Gazette* containing an Ordinance so published, and any copy of an Ordinance published under the authority of Government, is accepted by the Courts in the island.

(*b*) Ordinances are printed for publication under the authority of Government in the Government *Gazette*.

The Ordinance is headed—

No ——— of ——— (Year)

(Title: Name of Governor);

and at the foot of it is written—

Passed in Council the (Date)

(Signed) ———————,

Clerk to the Council.

Assented to by His Excellency the Governor, the —— day of ———.

(Signed) ———————,

Colonial Secretary.

(*c*) At the conclusion of each session a collection of all Ordinances enacted during the preceding session is published.

(*d*) The collection is accompanied by a table of contents and an index; and since the year 1897 there is also published with each collection of Statutes a table showing the effect of the legislation of the session on previous legislation.

(*e*) A revised edition of the Ordinance was published in 1872, and a collective edition was prepared by Mr. J. H. Templer, Crown Counsel, in 1894-5, under the authority of Government.

(*f*) There is no edition of Selected Statutes corresponding to Chitty's *Statutes of Public Utility*.

(*g*) There are no Private Acts published.

V.—Revision of Statutes.

(*a*), (*b*) In 1867 an Ordinance was enacted for compiling a new edition of the Ordinances, and the revised edition of the Ordinances mentioned above was prepared in pursuance of that Ordinance, and published in 1874. Its contents are arranged chronologically. That Ordinance has had its effect, and no machinery exists for further revision of the Ordinances. When Mr. Templer prepared his collection of Ordinances, an Ordinance was passed by the Legislative Council repealing such enactments as had ceased to be necessary, so that Mr. Templer's edition includes all the Ordinances in force up to the date of its being published.

VI.—Indexing of Statute Law.

There is no general index of the Statute Law, but from time to time Government publishes the Ordinances in the form of volumes, and to each such volume is attached a list of the Ordinances contained in the volume, and an index to the titles.

To the revised edition of Ordinances published in 1874 there is a general index attached.

VII.—Consolidation and Codification.

(*a*) In almost every session of recent years consolidating Ordinances have been passed through the Legislative Council, and from time to time Ordinances have been passed codifying certain branches of the law. No special machinery exists for the purpose.

The following Codes are now in force in the island:

(1) The Ceylon Penal Code, enacted in 1883, prepared by Sir Bruce L. Burnside, then Queen's Advocate, and based on the Indian Penal Code.

(2) The Civil Procedure Code, 1889, prepared by the late Sir Samuel Grenier, Attorney-General, and based to a large extent on the Indian Civil Procedure Code.

(3) The Ceylon Evidence Ordinance, 1895, prepared by Mr. C. P. Layard, Attorney-General, and based on the Indian Evidence Act.

(4) The Sale of Goods Ordinance, 1896, prepared by Mr. C. P. Layard, Attorney-General, and based on the English Act.

(5) The Criminal Procedure Code, 1898, prepared by Sir John Winfield Bonser, Chief Justice, Mr. C. P. Layard, Attorney-General, and Mr. P. Ramanathan, C.M.G., Solicitor-General, and based to a large extent on the Indian Criminal Procedure Code.

VIII.—Subordinate Legislation.

(1) No official or other machinery exists for the preparation or passing of measures of subordinate legislation, nor is there a collection of or index to such measures.

(2) Rules, Regulations, Orders, and Bylaws made by the Governor in Executive Council under the authority of Ordinances are prepared in some cases by heads of departments, but generally by the Attorney-General. They are promulgated by publication in the Government *Gazette*.

(3) Rules, Regulations, and Bylaws are also made by local bodies such as municipal councils and local boards under the powers vested in them by different Ordinances, and when made by those bodies are in pursuance of the provisions of such Ordinances submitted to the Governor in Executive Council for approval, and if approved are promulgated by publication in the Government *Gazette*.

(4) Rules are also made by village communities created by Ordinance No. 24 of 1889, and such rules when made have to be submitted to the Governor and Executive Council for approval or disallowance, and if approved are promulgated by publication in the Government *Gazette*.

(*d*) BARBADOS.

[*Contributed by* Sir Conrad Reeves, *C.J.*]

I.—Common Law as the Basis of Statute Law.

(*a*) The colony of Barbados, so far as historical information goes, was founded by British subjects somewhere in 1624-5, and has always been essentially an English possession. By Charter granted to the colony by His Majesty Charles I., confirmed and ratified about 1652 by commissioners on behalf of the Commonwealth of England, it is, amongst other things, declared (Art. 3) "That no taxes, customs, imports, loans, or excise shall be laid, nor levy made on any of the inhabitants of this island without their consent in a general Assembly." And from that period representative Assemblies, elected by colonists possessing the right of suffrage as fixed by

law, have been annually elected and called together, who, with the consent of the Legislative Council, a body nominated by the Crown, and consisting of nine members, have uniformly passed laws for the good government of the colony, and voted supplies to the Crown for carrying on the Executive Government, discharging all other duties and exercising all constitutional rights appertaining to a representative legislative body. Every enactment must receive the assent of the Governor, and the Crown always has the prerogative right of disallowing any Statute, even though assented to by the Governor. One of the earliest Acts on the Statute Book, entitled, "An Act for the Better Ascertaining of the Laws of this Island," is dated March 22nd, 1666. By s. 1 of this Act it appears that Barbados was settled in 1625; and by s. 2 commissioners were appointed to collect all the laws of the island then in force.

The laws in force in the colony are, firstly, the Common Law of England; secondly, such Acts of Parliament as were passed before the settlement of the island, and anterior to the Charter rights conferred as I have stated above; and mainly, of course, the Acts and Statutes passed by the local Legislature. It is accepted doctrine that, in the case of a colony acquired by the occupancy of British subjects, the law of England then in being is immediately and *ipso facto* in force in the new settlement, so far as such law is applicable to the situation and condition of the colony. And I may say in this connection that one of the most salutary of those English Statutes in force without re-enactment, so as to get rid of provisions deemed unsuitable to the circumstances of the colony and which may be found perhaps embarrassing in practice, is the 13 & 28 Eliz., No. 4.

The Common Law of England being the Common Law of this colony in all matters affecting the rights, liberties, and interests of persons and property, our procedure, whether in equity or at law, is substantially the same as it is in the Court of Chancery and in the Common Law Courts in England. I cannot more fully illustrate this than by saying that, in the local law libraries are to be found all the equity and Common Law treatises and text-books, together with the Chancery and Common Law reports from the earliest times, coming down to the latest Law Journal reports and the later law reports. These are cited every day in our Courts by judges, magistrates, counsel, solicitors, and attorneys. Chitty's General Practice, I need not say, covers extensive ground. Addison and Chitty are in constant use in matters of contract and in tort; whilst Jarman is the authority in all proceedings appertaining to the construction of wills. And as I am now mentioning wills, I may at once dispose of one point in connection with that matter, and that is with regard to the law of this island as to the making of wills. By s. 9 of the Statute 1 Vict., No. 26, it is enacted substantially that no will or testament or codicil shall be valid unless it be in writing and signed at the foot or end thereof by a testator, etc.

The Wills Act, to be found amongst our modern consolidated laws, contains almost all the main provisions of the English Statute immediately above referred to. But, with regard to the making of wills, we have stood by the old Statute of Frauds, which was specially copied and re-enacted by the Legislature in 1762. The third section of this Act declares, "And be it further enacted by the authority aforesaid, That from and after the commencement of this Act, all Devises and Bequests of any Lands, Tenements any ways devisable, shall be in writing, and signed or acknowledged by the Party so devising the same, or signed by some other person in his presence, and by his express directions; and shall be attested and subscribed in the presence, sight, or hearing of the said Testator, by two or more credible witnesses, or else they shall be utterly void and of none effect."

The Wills Act of this island, the short title of which is, "The Wills Act, 1891," at s. 3, in terms re-enacts the above cited provision of the Statute of Frauds, and also contains the following proviso: "Provided always that nothing in this Act contained shall extend or be construed to extend to any last will or testament, devise or bequest, which shall be written throughout in the proper handwriting of the testator or devisor." So that wills of personalty, at any rate, stand upon the same footing as they did in England before January 1st, 1838, whilst holograph papers, shown to be testamentary, are good and sufficient for the devising of real or the disposing of personal estate, without being witnessed or even signed at the end by the testator.

The local Legislature, it goes without saying, has the right to pass any enactments it thinks proper, although those enactments may be in derogation of the Common Law. And no laws passed ordinarily by the Imperial Parliament are in force here unless it is so declared in the Imperial Act, or unless it can be so inferred unmistakably from its provisions. I may illustrate this by saying that certain provisions of the Imperial Merchant Shipping Acts are in force, and so, too, the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., No. 27.

Our Statute Book, however, will be found to contain, as special enactments of the Legislature, the main provisions of many important Statutes affecting real and personal estate, relating to trade, and for furthering the administration of justice, that have been passed from time to time by the Imperial Parliament; not a few of these being suitable compilations of the original and all amendment Acts, also (if any) relating to the several matters enacted.

In the index to the consolidated Statutes of the colony, published in 1893 after a most careful revision, will be found the short titles of all such Statutes. Amongst them are the Statute of Distributions; the Act "for the Limitation of Actions and Suits Relating to Real Property and for Simplifying the Remedies for Trying the Rights Thereto," 3 & 4 Wm. IV., No. 27; the Conveyancing Act; the Inheritance Act; the Dower Act, 3 & 4 Wm. IV., No. 105; the Trustees Act, in relation to infants administrators, and

guardians; the Settled Estates Act; the Bankruptcy Act; the Companies Act; the Bills of Sale Acts, 1878-82; the Libel Act (embodying all the latest provisions of the English Statutes on the subject); the Abolition of Imprisonment for Debt; the Fugitive Offenders (Extradition) Act; the Married Women's Property Act; the Interpretation Act, 1889, 52 & 53 Vict., No. 63, repealing Brougham's Act, which we had on the Statute Book previously; and divers other English Statutes, so far as the provisions of those Statutes are deemed suitable to the limited exigencies of the colony.

We have here also, by enactment of the Legislature, a very efficient County Court, or, as we term it, Petty Debt Court Jurisdiction, subsidiary to the Common Law, Equitable, and Probate Jurisdiction of the Supreme Court.

All summary criminal jurisdiction is exercised in this island by stipendiary magistrates alone, styled police magistrates. The island is divided into eleven parishes, and these parishes comprise six districts. Besides exercising a criminal jurisdiction, each magistrate has conferred upon him a limited civil jurisdiction—in debt to the amount of £20, and in contracts and tort to £10. This last-mentioned jurisdiction was brought into existence in the year 1869 by the passing of an Act corresponding in its main provisions to the English Act passed in 1846, and entitled, "An Act for the More Easy Recovery of Small Debts and Demands," 9 & 10 Vict., No. 95.

We have also a Court entitled, "The Assistant Court of Appeal," which was brought into existence in the year 1839, immediately after the final emancipation of the slaves, and, I may say, especially in the interests of the newly emancipated. That Court consists of three judges, being English barristers, and an appeal lies to it, no difficulty whatever being interposed to hamper appeal from all decisions and orders from the stipendiary magistrates in the exercise of their criminal and civil jurisdiction. The Court is empowered to re-hear the case, to examine both parties, to call new witnesses if necessary, and then to pronounce such judgment or to make such order, with or without costs to either party, as to the Court shall seem meet.

Upon this appellate jurisdiction of the Court has been drafted, in recent years, an original jurisdiction in debt and damages up to £50. But the Court is prohibited from adjudicating in any action, plaint, or statement of claim in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage.

Having regard to this prohibition, the Court also has conferred upon it an equitable jurisdiction up to £500, and also a probate jurisdiction where the subject-matter does not exceed £50 in value. I ought to add that an appeal lies to the Chief Justice, who alone presides in the Supreme or Superior Court, from all decisions of law, pure and simple, come to by the Assistant Court of Appeal in the exercise of its appellate jurisdiction,

and also from all decisions, judgments, or orders of any kind come to or made in the exercise of its original jurisdiction.

The Superior or Supreme Court is presided over by a sole Chief Justice, who is judge in the Court of Chancery and in the Court of Common Pleas; which latter Court has, in principle, all the unlimited jurisdiction of the Queen's Bench, Court of Common Pleas, and Exchequer in England, as those Courts were constituted before the passing of the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., No. 66. The said Chief Justice is Vice-Chancellor in Equity and Judge in Probate and Vice-Admiralty proceedings. Legislation in these several departments has not, up to the present time, attained to the point reached by the above-mentioned Supreme Court of Judicature Act. There is no Equity, Common Law, and Probate division. Our Chancery procedure is precisely what it was in England before the passing of the above-mentioned Procedure Act; whilst our Common Law procedure is based mainly and substantially upon the English Common Law Procedure Acts. A suit in Chancery is commenced by filing a bill or petition of claim, and the subsequent proceedings are conducted in accordance with Daniel's Practice, subject to the provisions of our Chancery Acts, altered and amended from time to time, and the rules of the Court. In our Probate procedure we are guided by Williams on Executors, and Browne's Probate Practice.

Civil actions are commenced in the Court of Common Pleas by filing a declaration in the office of the Registrar and serving a copy of it, together with a summons, on the defendant. The several Courts have rules of practice which are substantially copied from the English rules before the passing of the before-mentioned Judicature Act.

The Superior Criminal Court, also presided over by the Chief Justice, has three sittings every year—in April, August, and December. The forms and procedure of this Court are the same as in England, and the Court exercises all the powers discharged by the juries and judges at the Central Criminal Court and at the Assizes. Our criminal code is a substantial re-enactment by the local Legislature of the Criminal Law Consolidation Acts of 24 & 25 Vict. Wherefore, Russell on Crimes, and Archbold's Pleadings and Evidence, with the entire range of criminal reports, are cited and relied upon in all matters brought before the Court by indictment. Here, as in England, the Grand Jury in the first instance find the bills upon which the accused persons are arraigned and tried, in open Court, by the petit jury. I may conclude this paragraph by adding that the Legislature has not yet seen its way to put upon the local Statute Book the Criminal Evidence Act passed by the Imperial Parliament empowering prisoners to give evidence in their own behalf.

With regard to (*b*)[1] in the same enclosure, I may at once dispose of this by saying that, since the final abolition of slavery in the year 1838 there

[1] "Is there any law applying exclusively to particular races or creeds?"

has been no law here applying exclusively to any particular race or creed. All classes and races of men, provided they be natives or British colonists, stand upon a common platform before the laws and constitution of the colony. All enjoy equal civil and political rights, subject to the provisions and enactments of the law which, in common, affect, regulate, limit, and control those civil and political rights and liberties.

II.—Statute Law.

The only matter which, in my opinion, so far as Barbados is concerned, comes within the purview of this question may be dealt with as follows: Barbados, up to the year 1880, formed one member of the Windward Islands group. This group was, in no correct sense, a confederacy, because, although the Governor-in-chief of these islands resided at Barbados, and discharged certain high executive functions common to them all, each colony had its own Legislature, and, in point of fact, very little was known in the several colonies about each other. There was no common tariff of duties and no common Treasury; and each island had its own independent institutions, civil, criminal, and administrative. For sufficient reasons, no doubt, about the period I mentioned above, Barbados was severed from its connection with the other islands comprising the said Windward group.

In the year 1857, pursuant to authority conferred by Orders in Council on each of the colonies of the Windward Islands, Acts or Ordinances were passed by the respective legislatures bringing into existence a Court of Appeal entitled, "The Windward Islands Circuit Court of Appeal." This Court was made to consist of the several Chief Justices of Barbados, Grenada, St. Vincent, Tobago, and St. Lucia. An appeal was declared to lie to this Court from all decisions and judgments of the respective Chief Justices of the Supreme Courts in the respective colonies. The Court was to be held twice a year, and was to sit in each colony from which an appeal came, no Chief Justice being permitted to sit upon the hearing of an appeal from his own decision or judgment. Barbados, as I have said, was severed from connection with the group; and Tobago, later on, also was allowed to sever its connection, and to become appendant to the colony of Trinidad. The Court of Appeal Act in each colony had to be slightly amended, owing to these respective severances. Although it might seem anomalous, the Windward Islands Circuit Court of Appeal is still in existence, and works, I believe, very satisfactorily to all concerned.

By the express terms of an Order in Council of March 3rd, 1859, it is made lawful for any person to appeal to the Privy Council from any final judgment, decree, order, or sentence of the said Windward Islands Court of Appeal, upon leave being given by the said Court, where the subject-matter of the suit is above the value of £300; and, moreover, it was expressly provided that nothing in the said Order in Council contained

should extend to take away or abridge the undoubted right of the Privy Council "upon the humble petition of any person or persons aggrieved by any judgment or determination of the said Court at any time to admit his, her, or their appeal therefrom. . . ." and to reverse correct or "vary such judgment or determination as shall seem meet."

III.—Methods of Legislation.

I now come to s. 3 of the said enclosure.

There is no special officer charged with the drafting of Bills. I believe that I am correct in saying that the clerk of the House of Assembly has always been a qualified solicitor in actual practice; and perhaps for a century—it may be more—this clerk drafted Bills at the request of any member of either House of Legislature who was desirous of bringing in a Bill. Formerly, and indeed up to a comparatively recent date, every Bill was commenced by an elaborate preamble setting out at great length the reasons why the Bill was framed. The enactment part commenced by saying, "Be it enacted by His Excellency the Governor, the honourable members of Her Majesty's Council, and the General Assembly of this island, and by the authority of the same, that;" then follow the several clauses of the Bill.

Up to the year 1881 the House of Assembly had, or at any rate exercised, the right of initiating money votes; but the Legislative Council had no such power, and could only adopt or reject any Bill providing for the expenditure of public money passed by the representative Chamber. But about the period mentioned, in consequence of strong representations from the Secretary of State, a Bill was brought in providing for the establishment of what is called the Executive Committee. This Committee consists of the Governor and his Executive Council—a body, be it understood, entirely distinct from the Legislative Council. The Executive Council has always consisted of the Governor, the officer in command of the Imperial forces, the Colonial Secretary, and the Attorney-General of the island. The Executive Committee Bill authorises the Governor to summon to this Executive Council, on such occasions as he shall deem fit, one member of the Legislative Council and four members of the House of Assembly; they being nominated by the Governor at the commencement of every new session of the Legislature after the election of members to the House of Assembly by the several parishes of the island, the number elected being twenty-four. This Executive Committee, so constituted, settles the estimates, which are laid before the House of Assembly by a member of this Committee having a seat in that chamber, exactly as is done in England by the Chancellor of the Exchequer.

The House of Assembly may refuse to pass any money Bill thus brought in, or may reduce any item; but the House has no power to increase or

to initiate any money vote. The practice has also grown up for the Governor at the opening of the Legislature to mention in his speech what Bills would be introduced at the instance of the Government; and, practically, all Bills of any importance are now drafted and brought in by the Attorney-General.

It is the practice to print in the official *Gazette* all Bills so brought in, after they have been read a first time; and they pass through the self-same stages as Bills do which are introduced in either branch of the Imperial Legislature.

Our Statutes, in recent years, are got up and drafted upon the models furnished by the Imperial Statutes.

Formerly every Statute was numbered. But, somewhere in 1890-1, a Commission, consisting of the Attorney- and Solicitor-Generals, was appointed to consolidate and revise the Acts of the island, which were spread over several volumes, owing to alterations and amendments, extending over very many years, which were found necessary, in consequence of the natural change of circumstances; some of these circumstances being the need felt of adopting from time to time provisions contained in Imperial Statutes.

In the year 1893, the necessary revision and consolidation having been completed, a new and complete edition of the laws was brought into existence, comprised in three thick large octavo volumes, with the excellent index to which I have already referred. Since that time the Statutes passed have been collected at the end of each session of the Legislature and printed in book form for easy reference.

The numbering formerly was in numerical order, numbering on from one to hundreds. But now the practice is reformed. The re-numbering of Statutes was provided for by an Act passed in 1893. Acts are numbered now according to the calendar year, the earliest in the year being No. 1, and so on to end of the year. This numbering is irrespective of the session of the Legislature during which the Acts might have passed.

Very few private Acts are to be found upon the Statute Book. They are in no way classified, but have their place among the Statutes, according to the date of their becoming law.

(*e*) LEEWARD ISLANDS.

[*Contributed by* W. H. Stoker, Esq., *Attorney-General.*]

(Answers to questions put by the Society of Comparative Legislation with respect to the Statute Law of this colony.[1])

I.—Common Law as the Basis of Statute Law.

All of the islands were acquired by settlement, except Dominica, in the case of which island, by Royal Proclamation made at the Court of St. James's on October 7th, 1763, the existing laws of England were applied to it.

(*a*) The Common Law of England, by settlement and adoption.

(*b*) No.

II.—Statute Law.

(*a*) Imperial Acts applying to the colony, Acts and Ordinances of the federated colony from the time of King William and Mary down to 1798, and by subsequent Acts and Ordinances of the presidencies thereof, both before and after the second federation in 1871, under the Imperial Leeward Islands Act of 1871, 34 & 35 Vict., No. 107, and by Acts of the federated colony since 1871, certain Orders in Executive Council, and Rules and Regulations made under the authority of Acts and Ordinances also have statutory authority.

(*b*) (i) So far as applicable to the conditions of the colony (See Tarring's *Colonial Law*, 2nd ed., p. 8), by settlement in the seventeenth century, and by adoption, as mentioned in answer to Question I. (*a*).

(ii) Nothing, it is believed, beyond the Proclamation above mentioned in the case of Dominica. But certain Imperial Statutes since date of settlement apply to this as well as to other colonies. They are set out in Tarring's *Colonial Law*, 2nd ed., chap. 6, p. 233, etc.

(iii) There has been no express adoption of the Statutes of the United Kingdom properly so called, except that by Act. No. 30 of 1877 of the Leeward Islands the Imperial Trustee Act of 1850, as extended and amended by 15 & 16 Vict., No 55, was extended to this colony.

(*c*) No.

(*d*) No.

[1] For the text of the questions, see p 86.

III.—Methods of Legislation.

(*a*) By the Attorney-General and two assistants to the Attorney-General They are the official draftsmen of legislative measures. They are appointed by the Crown, to which they are responsible. One of the assistants resides in the Island of St. Kitts, and is an official member of the Island Legislative Council of St. Christopher-Nevis, and the other resides at Dominica, and is an official member of the Island Legislative Council of Dominica They usually have charge of the Ordinances in their respective local legislative councils. Their duties do not extend to the drafting or intro duction of private or unofficial measures.

(*b*) Crown Colony: Tarring's *Law of the Colonies*, 2nd ed., chap. 3 s. 1, p. 70, Classes A, B (2). See also Anson on the *Law of the Constitution*, Part II., the Crown, 2nd ed., p. 266, Group B.

Each island legislature now has the Crown Colony form of constitution and since December, 1899, the Federal Legislature has been assimilated in constitution to the island legislatures. Previously to December, 1899, the federated colony of the Leeward Islands belonged to Group B (*b*) mentioned in Mr. Tarring's book. There is only one chamber in each legislature.

(*c*) Generally to members of the Council, where practicable. Under Standing Orders and Rules, which are, however, not very rigid on the point.

(*d*) Passage through Legislative Council, on motions for first and second readings, passage through committee and third reading, Governor's assent, and sometimes proclamation. Sometimes the Act or Ordinance contains a clause suspending its operation until Her Majesty's pleasure is made known. This is so in the case of certain measures of the kind described in the Royal Instructions to the Governor, unless urgent necessity exists for bringing them into earlier operation. In certain cases measures are reserved for the Royal assent. These cases are the same as those where a suspending clause is required, and the Royal Instructions are of the usual kind.

(*e*) To both standing and special committees, generally, and not merely on questions of form.

(*f*) Yes. Interpretation of Laws, Acts, and Ordinances have been passed in the federal and island legislative councils.

(*g*) Yes, and oftener;—in fact, whenever summoned by the Governor, or the Administrator, or Commissioners in the presidencies. The General or Federal Legislative Council usually meets only once a year.

(*h*) By number and calendar year, according to the time of assent. Yes, it has been the practice for many years to confer a short title on Acts and Ordinances when convenient, but it is not invariably done.

(*i*) Yes, they are by the Standing Orders and Rules of each legislature, and also under the Royal Instructions. Public advertisement is required of private, but not of public, Bills.

(*j*) No.

IV.—Publication of Statutes.

(*a*) Local Ordinances are published or proclaimed, as the case may be, by the Provost-Marshal of the Presidency under the authority of the Governor. Federal Acts are not formally published. The production of the official copy or print.

(*b*) Singly, and in bound copies. They are obtainable at the office of the Colonial Secretary of the colony.

(*c*) Yes, in a bound volume containing the Federal Acts and Island Ordinances.

(*d*) No; only a table containing the distinguishing number and the title of each Act or Ordinance.

(*e*) There are some ancient collections, but the latest one for Antigua is a volume published by authority in 1865 and compiled under local statutory authority. The preface to this volume, signed by the Commissioners who compiled it, contains useful information as to its contents. One was also compiled in Dominica, and published in 1858, containing the laws from 1763 to 1841. An edition of the Acts of the federated colony of the Leeward Islands from 1872 to 1885 was compiled by Mr. Thomas Baynes, formerly Solicitor-General, and afterwards Puisne Judge, of this colony. It was printed at the public expense and published in two volumes. There are no periodical editions of the laws except the annual copies of the Statutes I have mentioned in answer to Question (*c*) under this head.

(*f*) No.

(*g*) In the ordinary way.

V.—Revision of Statutes.

(*a*) Yes, Statute Revision Acts and Ordinances were passed in each Presidency in 1892, but none has been passed for the federated colony since its federation in 1871, except No. 6 of 1880, which, however, only deals with Presidential Acts and Ordinances. There is no existing machinery for the purpose.

(*b*) No, except the editions I have mentioned in answer to Question (*e*) under Head IV.

VI.—Indexing of Statute Law.

There is none beyond that mentioned in answer to Question (*e*) of Head IV. It should be added that the colony is very poor, and printing alone is a serious consideration. A few years ago a set of Bankruptcy Rules was drafted by a former Attorney-General, but was not proceeded with on account of the expense which would be incurred in

printing it. A short set of rules was passed instead, adopting the English rules so far as applicable, the question of applicability to be decided by the judge.

VII.—Consolidation and Codification.

(*a*) No systematic steps, but when amending legislation is introduced, consolidation is sometimes adopted when practicable or advisable. No codification has taken place.

(*b*) No.

(*c*) None, in the proper acceptance of the term.

VIII.—Subordinate Legislation.

The Clerk of the Executive Council usually prepares the ordinary Governor's Orders in Council, but in cases of difficulty they are usually settled by the Attorney-General. They are published in the official *Gazette*, the production of which is evidence under the Leeward Islands Act, No. 18, of 1890. Rules or Regulations made under statutory authority are usually drafted by the head of the department to which they relate, but are invariably sent down to the Attorney-General for perusal, revision, or settlement. There is no collection of or index to such subordinate legislation, beyond the index to the *Gazette*

Note.—"In the case of this colony the answering of questions of this sort is especially difficult, by reason of the complicated nature and enormous mass of legislation, both federal (at two periods) and local, relating to the Colony and component parts thereof. Each Island Presidency has its own Legislature, in addition to Federal Legislature on certain subjects, and it is often difficult to find out what Statutes are in force and what the law is."—*Note by Attorney-General of Leeward Islands.*

(*f*) BRITISH ISLANDS IN WESTERN PACIFIC.

I.—Common Law.

(*a*) In respect of all non-native persons in the British Solomon Islands and Gilbert and Ellice Islands Protectorates, and of British subjects in the other islands and places within the jurisdiction of the High Commissioner for the Western Pacific, the Common Law of Great Britain, under the authority of the Pacific Order in Council, 1877.

(*b*) The Pacific Islanders' Protection Acts, 1872, 35 & 36 Vict., No. 19, and 1875, 38 & 39 Vict., No. 51.

II.—Statute Law.

(*a*) Of native Laws framed by the tribal councils, and Queen's Regulations issued under the authority of the Order in Council above cited.

(*b*) Under the provisions of the Pacific Orders in Council, 1877, s. 22, and 1893, s. 20, the Statute and other Law for the time being in force in England is exercisable within the jurisdiction of the High Commissioner for the Western Pacific, subject to the other provisions of the Orders in Council referred to.

(*c*) No.

(*d*) Native Laws are in force in the British Solomon Islands and Gilbert and Ellice Islands Protectorates.

III.—Methods of Legislation.

(*a*) There is no official draftsman.

(*b*) There is no legislative chamber.

(*c*) Draft measures are not published before introduction.

(*d*) Regulations passed under the authority of the Pacific Order in Council take effect after publication in the manner shown below—reply to IV. (*a*).

(*e*) Draft regulations may be referred to the chief Judicial Commissioner.

(*f*) No.

(*g*) See reply to III. (*b*).

(*h*) Queen's Regulations are numbered consecutively with reference to the calendar year of issue. "Short titles" have been conferred on these Regulations since the first one was passed.

(*i*) All regulations are of a public character.

(*j*) This practice is not followed.

IV.—Publication of Statutes.

(*a*) Regulations are promulgated by publication in the *Fiji Royal Gazette*, and by exhibition at the places appointed for the sittings of the Courts held under the provisions of the Pacific Order in Council. Publication in this manner is evidence of a Regulation having been passed. They have effect unless and until they are disapproved by a Secretary of State.

(*b*) Regulations are printed in the form of the specimen appended hereto, and under the authority of the High Commissioner for the Western Pacific.

(*c*) } This is not done.
(*d*) }

(*e*) No collective editions of the Regulations have been published.

(*f*) There is no such edition.

(*g*) See reply to III. (*i*).

V.—Revision of Statutes.

(*a*) and (*b*) The replies are in the negative.

VI.—Indexing of Statute Law.

There is no index.

VII.—Consolidation and Codification.

(*a*), (*b*), and (*c*) In the negative.

VIII.—Subordinate Legislation.

Rules of procedure may be drawn up and issued by the High Commissioner, with the assent of a Judicial Commissioner, and under the authority of the Pacific Order in Council. Such rules are promulgated in the same manner as the Queen's Regulations previously referred to, and have effect unless and until they have been disapproved by a Secretary of State.

(*g*) THE FALKLAND ISLANDS.

[*Contributed by* The Hon. W. Gray Wilson, C.M.G., *Governor and Chief Justice.*]

STATUTE LAW OF THE FALKLAND ISLANDS.

I.

By 6 Vict., No. 13, power was given to Her Majesty to make laws for these settlements, and to delegate in whole or in part to any three or more persons within these settlements the powers so vested in Her Majesty.

On June 23rd, 1843, Her Majesty granted a Charter to the settlements, and therein constituted a Legislative Council, but reserved to herself in Council and to Parliament full legislative powers.

The Legislative Council by Ordinance No. 10 of 1853 constituted a magistrate's Court, and conferred upon it the jurisdiction and powers exercised by the Courts of Queen's Bench, Common Pleas, Exchequer, General, Quarter Sessions, Oyer and Terminer and Gaol delivery, Assize and Nisi Prius and Equity and the Prerogative Court of Canterbury, and all the powers of the Lord High Chancellor.

By Letters Patent of February 25th, 1892, these settlements were made a colony, and the power of Parliament to legislate was abrogated.

No law applies exclusively to any particular race or creed.

II.

The Statutes of the United Kingdom operate in the colony by virtue of express adoption by the Legislature of the colony (Ordinance No. 1 of 1898).

III.

Drafts of legislative measures are prepared by the Governor, there being no official draftsman.

The constitution of the Legislative Council is determined by the Letters Patent of February 25th, 1892: four official, two unofficial members.

All Bills are published for one week before introduction, under Ordinance No. 1 of 1898.

Every Bill is read by title three times; and clause by clause in committee of the whole Council, after the second reading.

Every Ordinance takes effect on the day on which it is sealed, unless a contrary intention be expressed therein (s. 2, Ordinance 1 of 1898).

Legislation is not referred, while in course of passage through the Legislature, to any officer or committee on points of form.

Ordinance No. 1 of 1898 is founded on the Interpretation Act, 1889, 52 & 53 Vict., No. 63, but is much fuller.

There is no annual session or fixed periods of session of the Legislature.

Ordinances are numbered progressively from No. 1 in each calendar year.

The first "short title" was conferred in 1886 on one Ordinance only in that year, and upon one in 1887. Since 1888 the majority of Ordinances have had short titles, and since January, 1898, all have had such titles.

Private Bills are treated as Public Bills.

Measures when introduced are not accompanied by an explanatory memorandum.

IV.

(*a*) The printing at the Government Printing Office or by a duly authorised printer is made (Ordinance 1 of 1898) a sufficient publication and promulgation, and every such publication shall be received as evidence of its having been duly passed.

(*b*) Ordinances are printed by the Government.

(*c*) The Ordinances of each session are not published in a collected form.

(*d*) No periodic volumes are published.

(*e*) A collected edition of the laws was published by Government in 1884, but Acts of the United Kingdom then in force were not included.

(*f*) There is no edition of Selected Statutes.

(*g*) Private Acts are published with Public ones.

V.

(*a*) No machinery exists for the revision and expurgation of the Statute Law.

(*b*) There is no edition of Revised Statutes.

VI.

There is no index of the Statute Law.

VII.

(*a*) The Ordinances are now in process of consolidation by the Governor; when completed they will be indexed and republished.

(*b*) No codes are in force.

VIII.

Rules, Regulations, and Orders are as a rule made by the Governor in Council. They are now being revised and consolidated, but there is no collection of them or index to them.

COMPARATIVE VIEWS OF CONTRABAND.

[*Contributed by* JOHN M. GOVER, ESQ.]

Introductory Remarks.—"Contraband" is a term of Italian origin denoting "prohibited goods" (*Contrabbando*, derived from *contra* and *bando*: Low Latin *bandum*, a ban or proclamation.—Skeat, *Etym. Dict.*). Its derivation well indicates its meaning in International Law. By "Contraband of War" is meant goods which, by reason of their hostile nature and destination, are liable to seizure and confiscation by a belligerent even though neutral-owned and carried in a neutral vessel. The Declaration of Paris of 1856, in establishing the principle of immunity of neutral goods in enemy ships and of enemy goods in neutral ships, expressly excepted contraband in each case. In view of the action recently taken by the German Government in regard to the seizure of German vessels in African waters, there appears to be some probability that the whole subject of Contraband and the right of Visitation and Search will, in the near future, be seriously raised with a view to its definition by International Agreement. Meanwhile, like so many other "principles" of International Law, it remains to all appearances a thing of shreds and patches, lacking uniformity and certainty, and constituting a chronic source of danger to the peace of nations.

It is not intended in the present note to attempt any comprehensive survey of the Law of Contraband. Still less is there any desire to assert any personal opinions of the writer as possessing any value whatever in the matter. Exhaustive expositions of the subject have been attempted, with more or less success, on many occasions by jurists of real eminence, though it must be confessed that their value is too often marred by the importation into them of racial bias and national jealousy. The object of the present article is merely to call attention to certain aspects of the subject which it is thought are apt to be overlooked, and to certain considerations, the neglect of which considerably interferes with an accurate conception of the subject.

The Anglo-American and Continental Views of Contraband.—The principle of Contraband of War is a creature of International Law, and of International Law alone. There is no *a priori* rule on the subject to which nations can appeal for guidance. This is really a platitude, but a platitude

too often ignored. Even Continental jurists have at length freed themselves from the fetters of philosophical tradition, which sought for International Law in some vague *Jus Naturæ*, to which all states and all laws were subordinate, rather than in the agreement and actual practice of states themselves. In point of fact the question of what is contraband, and what are the rules governing it, must be determined solely by reference to such agreement and practice.

Is there a unanimity or substantial unanimity of agreement and practice among nations upon the point? If not, or in so far as there is not, then International Law upon the subject is lacking. It is quite true that absolute unanimity is not necessary to make what is substantially a working rule of International Law. The adhesion to a principle of all the greater powers whose interests are affected by it, is no doubt, for practical purposes, sufficient. It cannot be safely asserted that such substantial unanimity exists with regard to the subject of Contraband. But the modern tendency towards the adoption of a common rule is very noticeable.

Among the more recent writers, M. Richard Kleen, in his very able monograph upon the subject,[1] has been at great pains to prove that the practice of nations with regard to contraband has, roughly speaking, followed two main lines: (1) that of Great Britain, and to a less extent of the United States of America, according to which contraband is not strictly confined to arms and munitions of war, but may embrace also "occasional contraband," varying with the circumstances of each case; and (2) that of all or most other states, which absolutely denies the principle of "occasional" contraband altogether, and confines the right of seizure to arms or munitions of war pure and simple. M. Kleen cannot at all events be accused of any bias in favour of this country. He is an extreme instance of the extreme type of anti-English Continental jurist. He at times almost forgets the philosophic calm beseeming a lawyer, in denouncing Great Britain as the chief stumbling-block in the way of international amity and unanimity. But in doing this he points the moral above mentioned—that there is, as a fact, a want of unanimity among nations upon the subject of Contraband. Whether he is justified in his accusation against this country is another matter. He admits that all the non-English-speaking states have on many occasions in treaties and practice lapsed from the ideal principle of the Armed Neutrality of 1780, and have temporarily deviated into the sphere of "occasional contraband." He also admits that Great Britain has at all events been consistent in her heterodoxy. It would therefore seem clear that, unless the British and American views are to be disregarded altogether, the elimination of the principle of "occasional contraband" from the sphere of International Law cannot be accepted at present. The truth is that the Law of Contraband is still in an evolutionary phase, and there

[1] "Le Droit de la Contrabande de Guerre," in the *Révue de Droit International*, vol. xxv., and published separately by G. Pedone, Paris.

are very many cogent, and some obvious, reasons why the Anglo-American view should merit the very gravest consideration in any future attempt to define the rules on the subject by International agreement. In the process of building up International Law the practice of a majority (even though a large one) of states cannot, merely by reason of being the practice of a majority, lay claim to inherent force and sanction. With regard to the question of the relative weight and value of the Anglo-American and Continental views of Contraband, the following considerations, amongst others that might be mentioned, afford some scope for reflection.

I.—**The Armed Neutrality, 1780.**—The inspiration of the Continental policy of Contraband is to be found in the Declaration of the Armed Neutrality of 1780. Primarily the Declaration was an attempt by the Baltic powers to protect their trade in naval stores and provisions. As Mr. W. E. Hall has astutely remarked, "It was natural that the secondary maritime powers should in time accommodate their theories to their interests." And, indeed, nearly all the states which acceded to the Declaration within a very short time afterwards found it expedient to relapse from the rigid ideal embodied in it. To gauge accurately the value of the Declaration as a *bonâ-fide* attempt to define the rights of belligerents on an equitable basis, it is necessary to scrutinise carefully the history of the Armed Neutrality.[1] The result is not encouraging to admirers of its principles.

II.—**The Peculiar Position of Great Britain.**—Again, it is a curious fact, though sufficiently obvious, that the materials from which the International Law of Visitation and Search, Contraband and Blockade, are almost entirely derivable, are to be found in the history of the great naval wars during and immediately preceding the Napoleonic period. In other words, national policies as to Contraband, and such "International Law" on it as can be deduced from them, took form during that long period when Great Britain had command of the sea, and was at war with half of the civilised world. A divergence of views between our own country and Continental states is therefore not an altogether unexpected phenomenon.

During the present century, and since the Treaty of Vienna, the only wars in which the maritime rights of belligerents have been materially affected have, with two exceptions, been those in which Great Britain was engaged. Even as regards these, owing to the temporary decadence of our own navy or the insignificance of the naval power of our adversaries, very few disputes upon questions such as Contraband and Visitation and Search have in fact arisen. As regards purely Continental struggles, such as the Franco-Prussian, the Russo-Turkish and the Graeco-Turkish wars, for all practical purposes they have added no precedents to the maritime aspects of International Law. In the only two cases in which Great Britain was not engaged and in which serious questions of contraband and capture did arise, one of

[1] See Phillimore, *International Law*, iii. 335, and the authorities there mentioned.

the belligerents was the United States of America; and in both these cases the United States vigorously asserted the English doctrine of "occasional contraband." In some respects the American view is even a broader one than the British, though it must be confessed that it has the merit (not generally allowed to the English practice by Continental critics) of having been propounded in unambiguous and consistent terms. Mr. Bayard, as recently as 1886, in referring to the inclusion of cotton in the category of Contraband in the Confederate war said, "I apprehend it to be the settled rule of International Law that the question of Contraband is to be determined by the special circumstances of each case."[1]

In the war between the United States and Spain, an elaborate list of contraband articles was issued on June 20th, 1898, by the Department of the Navy by way of "Instructions to Naval Officers." This followed very closely the list in our own *Admiralty Manual*, and similarly classified the goods into those (1) absolutely and (2) conditionally contraband. The former included, in addition to arms and ammunition of various kinds, such things as pontoons, "portable range finders," military uniforms and equipments and horses. The latter comprised coal when destined for a naval station or port or for the enemy's navy, railway and telegraph materials and money when destined for the forces of the enemy, and also provisions when destined for the enemy's ships of war or for a besieged place.[2]

Article 4 of the President's Proclamation of May 9th, 1898, seems also to indicate that coal would under certain circumstances be regarded as contraband.[3] In the course of the war, a British ship, the *Ristormel*, was captured and its cargo of coal in fact confiscated.[4]

In the same war the Spanish Government published a decree including in contraband, in addition to arms and ammunition, such things as "uniforms, straps, pack-saddles and artillery, and cavalry equipment, marine engines, and in general all appliances used in war."[5] It is also worthy of special note that the present Shipping Code of Italy, in defining contraband, does so expressly "subject to special treaties *and to special declarations made at the beginning of war.*" This seems to show a distinct tendency towards the Anglo-American view.

III.—**Inconsistency of the Continental Practice.**—The Continental practice during this century has certainly been far from consistent with the rigid rule of the Armed Neutrality. The most noteworthy deviations into the sphere of "occasional contraband" have not even been justified by the Anglo-American principle of belligerent expediency. M. Kleen, in referring to the well-known rice case, during the Franco-Chinese "state of

[1] See Wharton, *International Law Digest*, s. 373, pp. 438 and 989: cf. *U.S.* v. *Dienkelman*, 92 U.S. 520, and *Young* v. *U.S.*, 97 U.S. 39.

[2] *Journal du Droit International Privé*, 1898, p. 1018.

[3] See *London Gazette*, May 10th, 1898.

[4] See *Times*, June 3rd, 1898.

[5] See *London Gazette*, May 3rd, 1898.

reprisals" in 1885, naïvely defends the French attitude on the ground that it was an "act of retorsion" against England, for refusing to allow French warships to coal in British ports. Apparently this was following the lead of Germany, when in 1870 Bismarck in effect declared coal contraband,[1] "provoked," as M. Kleen says, "by the vacillations of the London Cabinet, against which it was an act of retorsion."

In the greater wars of the last ten years, few of the great European powers have made any clear declaration as to contraband. No reference to it was made in the Neutrality Decrees of France or Russia in the Chino-Japanese war of 1894, the Turco-Greek war of 1897, or the United States-Spanish war of 1898.

It may further be observed that, even as regards "munitions of war," there is no unanimity of opinion and practice among Continental states. No attempt was made to define the expression in the Declaration of the Armed Neutrality, and the ambiguity of the term is certainly accentuated by the fact that, in the latter document, sulphur, and in many subsequent treaties and decrees, other distinctly belligerent articles are mentioned in connection with "munitions of war," but in *separate* terms. For instance, the French "Instructions to the Navy" in 1854 and 1871 add "saltpetre and military equipments, *and things made for war and destined for the enemy*"; the Italian treaty with the United States of 1871 adds "military equipment and clothing"; and the Russian ukase in 1877 added sulphur and saltpetre. "Munitions of war" is so vague and elastic a term as almost to admit within its scope all articles which the Anglo-American view treats as "occasional contraband." An examination of the full list of articles stated to be "absolutely" or "conditionally" contraband in Mr. T. E. Holland's *British Admiralty Manual of Prize Law* (1888), indicates how easily the inclusion of almost every item might, at any rate, be justified by adopting the French test of 1854 and 1871.

IV.—**Practice of States in Recent Times.**—In an attempt to arrive at a conclusion as to the maximum extent to which there can be said to be community of view between modern states with regard to the nature of contraband, it is very necessary to confine attention to the *most recent* declarations or practice of each state.

To rely too much upon traditions of the Armed Neutrality, or of the Napoleonic wars, is entirely misleading. It is equally unsatisfactory to treat the opinions or *obiter dicta* of theoretical jurists, however eminent, as any definitive indication of actually existing Law. This, it is submitted, applies not merely to isolated text-books, but even to the resolutions of the Institute of International Law. It is owing to an undue regard for ancient history and the opinions of writers, that so many text-books, and particularly Continental ones, are, as expositions of concrete International Law, somewhat stale and unprofitable. The opinions of eminent International jurists, like

[1] See *Wharton*, s. 369.

those of writers upon the National Law of any particular state, have no inherent force, and do not *make* Law. They are valuable only in so far as—*first*, they expound the actual agreement or practice of states which go to make up the Law, and *secondly*, they may influence particular Governments in deciding as to the policy or practice which their states shall adopt. It is for the reasons mentioned, and not from any want of respect for the individual views of jurists, that for the purpose of the present article such views are not appealed to as direct authorities upon the matters in question.

The real rules of International Law recognisable at any given time can only be deduced from an examination and comparison of

(*a*) joint International declarations or treaties, such as the Declaration of Paris, 1856, the Geneva Convention, and the Final Act of the African Berlin Conference;

(*b*) more limited compacts or treaties between particular states;

(*c*) decrees or pronouncements by the Governments of particular states;

(*d*) diplomatic correspondence between particular states;

(*e*) decisions of Prize or other Courts of particular states;

(*f*) decisions of International Courts of Arbitration; and

(*g*) the actual practice *in recent times* of each state.

Having regard to these, and to these only, considerable light is thrown upon the subject of Contraband by a consideration of the *modern* attitude of nations. It is sufficient for present purposes to refer only to the Great Powers of Europe and the United States of America. While doing so, it is only reasonable to attach special weight to the position of those states which may more particularly be called great naval or maritime powers—*i.e.* the United States, Great Britain, Germany, France, and Italy.

Of these, the modern attitude of the *United States* and *Great Britain* has been already referred to in detail.

The modern view of *Italy* is best defined in the article in its Shipping Code above mentioned; and the most recent interpretation of this is to be found in the decision of the Italian Prize Court in 1896 in the *Doelwyk* case, particulars of which are given later on in this article.

As regards *France*, the wide terms of the French "Instructions" in the Crimean and Franco-German wars have already been alluded to. These and the Rice decree of 1885 denote a policy very far removed from the strict limitations of the Armed Neutrality.

Russia's position as a naval and mercantile power is of very recent date. But it must be confessed that she has adhered more closely to last century's traditions than any other state. The ukase of 1877 confined contraband to "munitions of war," sulphur and saltpetre, and at the African Conference of 1884 Russia strenuously protested against the inclusion of coal under any circumstances.

Austria-Hungary is by physical conditions little interested in maritime

matters. In 1870 the Government decree was couched in vague terms, and forbade subjects to carry to belligerents "articles reputed contraband by International Law, or by the ordinances published by belligerent governments." This is certainly open to construction as a departure from the strict eighteenth-century view.

With regard to *Germany* we have the advantage of a very recent pronouncement upon the subject. On January 19th, 1900, Count von Bülow made a declaration in the Reichstag in connection with the seizures of German ships in South African waters. It indicates a distinct advance on the part of the German Government beyond the traditional Continental view of contraband.

The sixth principle enunciated was as follows:

> Contraband of war is only goods or persons *adapted for the purposes of war* and at the same time destined for one of the belligerents. What kind of goods can be regarded as contraband according to the above definition is a disputed question. *Apart from the case of arms and ammunition*, this question will as a rule be capable of decision only when every circumstance of a particular instance is taken into account, unless a belligerent has duly and expressly intimated to neutral Powers the nature of the articles which it intends to treat as contraband, and the neutral powers have raised no objection.[1]

Tendency to enlarge the Scope of Contraband.—The conclusion to be drawn from this short survey of the modern attitude of the Greater States is very striking. A very marked tendency is evinced on the part of all the Continental Powers, except perhaps Russia, towards an extension of the conception of contraband in the direction of the Anglo-American view. Upon the other hand, there is some ground for saying that both Great Britain and the United States have in modern times shown an inclination to recede from the extreme application of their view which occasionally prevailed a century ago. It is exceedingly doubtful whether there is now, at bottom, any really serious divergence between the English and the Continental views. The doctrine of "occasional contraband," as advocated now by the two countries, has lost that element of "*capriciousness*" of which Continental jurists have always, perhaps with some justice, accused it. Neither Great Britain nor the United States now claims, even if either ever claimed (which, except in the minds of Continental jurists, is doubtful), the right of a belligerent to make anything contraband which he chooses. The Anglo-American claim is simply that anything which under special circumstances is in fact useful and adaptable for the purposes of the other belligerent's hostile operations, becomes in such event contraband, and can be treated as such. It is unlikely in the future that it will ever be employed to cover the case of articles such as provisions, except when they are really "adapted for the purposes of war." If the doctrine is thus limited, it seems

[1] See *Times*, January 20th, 1900.

difficult to see how it seriously conflicts with Continental views and practice, and how European powers can reasonably object to it.

One thing at all events seems clear. It is impossible in modern times to strictly adhere to any fixed category of contraband articles. From the very nature of things any such category must necessarily be open to expansion with the changing conditions of war and commerce. Inventions from time to time in the shape of new weapons and explosives; the rapidly altering methods of fighting on land as well as on sea, so clearly illustrated in the present South African war; and the great improvements in transport and commissariat arrangements, all tend to make the old limited doctrine of Contraband as out of date as its sponsor, the Armed Neutrality. Force of circumstances, in spite of the protest of many eminent jurists, seems to be tending towards the universal adoption of a rule more in harmony with the Anglo-American than with the Continental doctrine. Perhaps the greatest impetus of all in this direction will prove to be the increase of naval power which seems imminent among the Continental states. Hitherto the benefit of the belligerent rights of visitation and search and capture of contraband has been experienced almost exclusively by Great Britain, in consequence of her pre-eminent command of the sea. When this pre-dominance ceases to be so marked, it may be that other states will find that their own experience of belligerent rights at sea will lessen their former bias in favour of restricting such rights. At the same time, it is to be observed that the rules of Search and Contraband are at bottom a compromise between belligerent and neutral rights. "Neutrals," as an American diplomatist well expressed it, "have a right to carry on their usual commerce, and belligerents have a right to prevent them from supplying the enemy with instruments of war."[1] At present such "right to prevent" is sanctioned by the liability of the ship or cargo to confiscation. But it is possible that in the future the subject may become one of Neutral State liability to actively prevent subjects from exporting "contraband" goods. The *Alabama* affair and the English Foreign Enlistment Act of 1870 were certainly steps in this direction, and it is not inconceivable that an extension of the principle embodied in them may shift the question of contraband into a different plane altogether from that which it now occupies.

The Recent Seizures near Delagoa Bay: (1) The Provision Question.—The recent controversy with the Governments of the German Empire and the United States with regard to seizures of ships by British vessels in South African waters has raised acutely several most interesting questions.

With regard to the United States, little need be said. The older historical cases in which provisions have been seized by a belligerent are too familiar to need comment. In spite of the British and French "Provision Orders" of the Napoleonic wars, and of the adoption of the principle involved in particular treaties of many states, it would certainly

[1] See *Wharton*, s. 370.

seem now to be quite out of date to recognise provisions under ordinary circumstances as contraband or quasi-contraband. It is obviously not to the interests of this country to do so—nor, in view of Lord Granville's protest to France in the rice case of 1885, could we consistently claim to adopt such a practice. In extreme cases it would no doubt be permissible. The *British Admiralty Manual* suggests that this would be so where provisions and liquors are "fit for the consumption of the army and navy" of a belligerent. This is not very happily expressed.[1] The conditions were better stated by the American courts in *The Commercen*, 1 Wheat, 382,—*i.e.* "if destined for the army or navy of the enemy or for his ports of naval and military equipment."[2] The observations of the United States minister at Berlin, with regard to the French rice seizures, in 1885, are of great interest on this point.[3] It seems only necessary to add that the recent seizure of American foodstuffs on board the *Mashona* and *Maria* could not reasonably be justified. It is understood that the British Government have frankly expressed regret, and have offered explanations satisfactory to the American Government, so that the incident is happily closed. The ships seized were released, and one at least of them has since discharged its cargo at Lorenco Marques.[4]

(2) **The Doctrine of Ultimate Destination.**—With regard to one of the vexed questions in relation to contraband, the situation created by the present South African war is almost unique. The Transvaal and Orange Free State are peculiar in having no seaboard and consequently no ports in their territory. The only means by which foreign goods can be imported into them is, for all practical purposes, either by way of British territory or through Delagoa Bay, which is Portuguese, and therefore neutral, territory. Neither of the Republics has any naval or even mercantile marine. So far as is known, no ship purports to fly their flag, and if it did so it is probable that such flag would not under the circumstances be recognised.[5] Again, Delagoa Bay being a neutral port cannot be blockaded. One consequence of these facts is that in the exercise by British cruisers of the right of Visitation and Search two of the *raisons d'être* of such right—*i.e.* the possibility that an ostensibly neutral ship may in fact be an enemy one, or that it may be bound for a blockaded port—have been absent.

The result has been that the only available object of Visit and Search in the present war has been to prevent contraband being carried to the enemy, and there seems some reason for saying that this circumstance has rather

[1] Compare the Admiralty Instructions in the case of the seizure of the *Herzog*. They are much better expressed. See *Parliamentary Paper* (Africa), No. 1, 1900, Letter No. 39 and inclosures.

[2] Compare the United States "Instructions" of 1898, quoted above.

[3] See Wharton, *Digest*, s. 370.

[4] See *Times*, January 21st, 1900.

[5] Compare as to this the curious case of the *Palme* in 1871: Dalloz, *Jurisprudence Generale*, Part III., p. 94.

tended to bring into more than usual prominence the searches and seizures which have actually taken place. Add to this the comparative unfamiliarity with the subject consequent upon the infrequency of serious naval wars in recent years, and the unfortunate results which have in fact attended the seizure of German ships, and the chorus of resentment in the Continental press is at all events to a slight extent accounted for.

The most interesting question, however, which has arisen from the peculiar conditions above-mentioned relates to what is commonly called the doctrine of "Continuous Voyages." The phrase in the present case is inapt, but the principle is the same as in the famous cases which arose in the American Confederate War of *The Springbok*, Blatchford Prize Cases 349, 5 Wallace 1; and *The Peterhoff*, 5 Wallace 35. The doctrine as laid down in these cases has been the subject of much discussion and criticism by jurists.[1] The principle underlying it is well expressed by Fiore (French edition by Antoine 1886, vol. iii., s. 1649) thus:

> Contraband goods destined for one belligerent may be seized by the other belligerent when found on a neutral ship sailing between neutral ports, *if it be plain that the intention was to supply the goods to the former belligerent.*

The doctrine is really a simple one, and by no means startling. The difficulty of it really lies in applying it. Unless the *mens rea* is very clearly proved in each case, the doctrine would no doubt become a dangerous one, and might well provoke serious friction.

The question arises whether it can be taken as representing an actually accepted rule of International Law. At present it cannot be safely asserted that this is the case. At the same time, when the question of Contraband is closely examined, it seems difficult to see how any state can well object to the rule in the abstract, though there may be some dispute as to the proper mode and conditions of applying it.

It is generally recognised that the essence of Contraband is twofold. As Professor T. E. Holland concisely expressed it in a recent letter to the *Times* (January 2nd, 1900), "Contraband implies (1) that the goods are fit for hostile use, (2) that they are on their way to a hostile destination." The Italian Shipping Code, referred to below in connection with the *Doelwyk* case, recognises the latter condition as essential. So the recent German declaration mentioned above says that contraband must be "destined for one of the belligerents." Indeed, the point is well settled.

What is Destination?—But the question is what is meant by "destination"? Is it the port to which the goods are immediately or ostensibly consigned, or is it the place to which or the person for whose benefit and into whose hands the goods are *really* intended to *ultimately* come? It would obviously be unfair to a belligerent, and inconsistent with any

[1] See Wharton, *International Law Digest*, iii., s. 362, where most of the different views are cited.

system of so-called Law, whether International or otherwise, to be satisfied merely with the ostensible or apparent destination of contraband goods, without venturing to ascertain whether it is also the real destination intended by the owner. To thus limit a belligerent's rights would be to stultify the Law of Contraband altogether. It would be sufficient for all contraband goods to be labelled and addressed to a completely innocent destination in order to free them from all risk of capture.

This is what actually happened in the Italian case of the *Doelwyk* in 1896. The facts as to this interesting case are admirably and fully stated in an article by M. Giulio Diena in the *Journal du Droit International Privé* for 1897, pp. 268 *et seq.*; and another by M. Prosper Fedozzi in the *Révue de Droit International*, vol. xxix., pp. 55 *et seq.* The case also indirectly came before our own Courts in *Ruys* v. *Royal Exchange Assurance Corporation*, L.R. [1897] 2 Q.B. 131.

The facts were, shortly, as follows: A Dutch ship, the *Doelwyk*, sailed from Rotterdam on May 17th, 1896, ostensibly for Kurrachee in India, with a large cargo of rifles and ammunition. Italy was then at war with Abyssinia. The ship was seized by Italian cruisers in the Red Sea, as she was bearing towards the French port of Djiboutil, with the avowed purpose of disembarking one passenger there. She was taken to Massowa, and ultimately the Italian Prize Court decided that the capture of both ship and cargo was justifiable on the ground that the latter was contraband of war. The ship and cargo were in fact released because Peace had since been made; but the Court dismissed the owner's claim for damages. The evidence clearly showed that the cargo was really destined for the Abyssinian army, and was intended to be unloaded at Djiboutil, and from thence transmitted by land to its ultimate destination. The Court refused to admit that the fact of the final transit being by land instead of by sea affected the question. In this respect, it will be observed, the case resembled the *Peterhoff*. The decision of the Italian Court was based on the provisions of the Italian Shipping Code, which must be taken to represent the Italian view of the rule of International Law on the subject. Article 215 of this Code provides that "neutral ships, laden wholly or in part with contraband, and destined for an enemy country, shall be captured. . . ." It is worthy of remark that the Dutch Government made no protest against the seizure or the judgment. The case is most interesting as being the first one in which the doctrine of "continuous voyages" has been raised since the *Peterhoff* case.

The "Bundesrath" Case.—With regard to the seizures of German ships during the present war with the South African Republics, the circumstances have been almost precisely similar. The *Bundesrath*, *Herzog*, and *General* were seized by British cruisers off the South-East Coast of Africa, and were bound for Delagoa Bay. They were brought into Durban for examination, on suspicion of having on board contraband destined ultimately for the Boer armies. The suspicion proved unfounded, and

the ships were released.[1] This fact does not, however, affect the principle involved.

One conclusion to be drawn is, that the British Government has adopted finally the doctrine of "continuous voyages," or as it might more correctly be called, the doctrine of *Ultimate Destination*. It has therefore made, and, it would seem, properly made, an advance upon the principle laid down more than thirty years ago by its own Courts in *Hobbs* v. *Hemming*, 17 C.B., N.S. 791. It also seems to be beyond doubt that the German Government has acquiesced in the principle. From the negotiations which have occurred relative to the seizures, and from the pronouncement by Count Bülow in the Reichstag on January 19th last, it is clear that the objections raised by Germany with regard to the seizures were solely concerned with the fact that the latter were effected on inadequate suspicions and in an inconsiderate manner, and not with the fact that the ships were bound to a *neutral* port. It is to be observed, however, that, owing to no contraband being discovered on board, the question in all its aspects did not arise. If, for instance, Mauser rifles had been found on board in large quantities, but ostensibly consigned to a *neutral* subject living at Lorenço Marques, it is interesting to speculate as to whether the German Government would have acquiesced in their confiscation. It is clear that upon the *Springbok* and *Doelwyk* principle, if the evidence sufficiently showed that the goods were ultimately destined for the Boer armies, such confiscation would be justifiable.

There seems, however, some reason for saying that the British authorities acted altogether too hastily in capturing and unloading the *Bundesrath* and other vessels. At the same time, if the statements contained in a letter in the *Times* of January 20th with regard to Samoa are reliable, an interesting light is thrown upon German methods in similar circumstances.

Attitude of the German Government.—With regard to the general position taken by the German Government in relation to Contraband, it appears that, in the course of the recent negotiations, the British Government was invited to give its assent to the wide principle that "*neutral goods carried on a neutral ship between neutral ports are not contraband.*" This was of course refused, and it would seem that the German Government regarded the proposition rather as a starting-point for further negotiations than as a serious statement of its own views.

Ultimately it propounded a series of six principles purporting to be "based on German naval and legal authorities." The fourth of these, broadly defining contraband, has been above referred to. The other five are not open to much criticism. They were as follows:

1. "Neutral merchant vessels on the high seas or in territorial waters—apart from the right of convoy, which does not affect cases in point—are

[1] *Times*, January 17th.

subject to the right of visitation on the part of ships of war of belligerents. This undoubtedly holds good as regards waters which are not too far distant from the seat of war. At present there are no special agreements with reference to mail steamers.

2. "The right of visitation must be exercised as considerately as possible, and without unnecessary annoyance. The proceedings may be divided, according to circumstances, into two or three acts: stopping the ship; examining the papers; searching the ship. The first two of these acts can be carried out at any time without further ado. If they afford grounds for suspicion the ship may be searched.
3. "If the neutral vessel has offered resistance when it is being stopped, or if an examination of its papers reveals irregularities, or if contraband is discovered on board, the ship-of-war of the belligerent may take the neutral ship into port in order that the matter may be examined and decided by a competent Prize Court.

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5. "If contraband is found it may be confiscated, but it depends upon the circumstances of each case whether indemnification is to be granted or not.
6. "If it was unjustifiable to take the vessel into port the belligerent state is bound to set the ship and its cargo at liberty without delay, and to give complete indemnification."

The six principles enunciated by Count von Bülow are, of course, in no sense exhaustive, but they might well serve as the text for more elaborate international discussion upon the subject.[1]

[1] Since this article was in type and too late for purposes of reference, the *Correspondence respecting the Action of Her Majesty's Naval Authorities with regard to certain Foreign Vessels* has been published as a parliamentary paper (Africa, No. 1, 1900). It appears that the German Government did not finally acquiesce in the *Ultimate Destination* principle, but "reserved to themselves the right to raise the question in the future."—J. M. G.

THE TEACHING OF LAW IN FRANCE.

[*Contributed by* THOMAS BARCLAY, ESQ.[1]]

Introductory Remarks.—In venturing to address your honourable body on the subject of legal education in France, I must express my regret that I am unable to make any comparisons from personal knowledge with the condition of legal education in the United States. I hoped had I been able to address you in person, to cure that defect by a visit to one or more of your law schools. If I then speak of American schools, I do so subject to correction.

Law teaching according to English ideas is necessarily associated with the organisation of the legal profession. In England, as you know, the two branches of the profession are still distinct. The barristers obtain their professional education under an arrangement, entered into among the four corporations known as Inns of Court, into which they are divided. By this arrangement lectures are provided for the students, though they are little attended by them, and qualifying examinations are held in the chief branches of the law preliminary to admission to practice in the Courts. A Corporation of Solicitors also provides lectures and examinations, which, combined with compulsory clerkship in practising solicitors' offices, qualify for the exercise of the solicitors' branch of the profession.

Apart from the professional studies and examinations, we have law classes at our universities where some law is taught, but generally without reference to practice, and degrees in law are granted which the Inns of Court recognise only to a limited extent.

I gather from the synopsis published in your most interesting *Report on Legal Legislation* of 1893 that, apart from the fusion of the two branches of the profession, legal education is in much the same condition in the United States as in England—that is, with a few exceptions, the law studies and examinations are expressly directed to the training of Court practitioners, whether counsellors or attorneys, the exceptions being that some special lectures are provided by certain universities on Roman law, general jurisprudence, and international law which have no reference to any professional course.

[1] A paper read before the American Bar Association at Buffalo, U.S.A.

In France the system is totally different.

Branches of the Legal Profession in France.—There the legal profession is divided into a great number of different branches. There are *avocats* admitted to plead before the Courts, *avocats* not admitted to plead before the Courts; *avoués* who have the monopoly of the procedure in Courts of First Instance; another set of *avoués* who have the monopoly of the procedure in the Appeal Courts, and a third class who combine the functions of *avocat* and *avoué* before the Court of Cassation. There are notaries who have the legal monopoly of drawing certain deeds and of delivering certified copies of documents of all kinds, and who, through this partial monopoly, have practically drawn all the conveyancing into their hands; there are *huissiers* who have the monopoly of process-serving of all kinds, including certain functions of notaries public in Anglo-Saxon lands; there are *agréés*, who have the monopoly of pleading before the commercial courts; and, lastly, there is the magistracy, not usually recruited from the Bar,[1] but forming a separate class of lawyers, who, again, are subdivided into the *parquet*, or public procurators—salaried public officials entrusted with the prosecution of criminal and correctional offences, and with the protection of the public interest whenever it is involved in a private action, and amongst whose powers are included the protection of women, children, and persons of infirm mind—and the bench, forming a hierarchy of judges who, in the French system, never sit less than three in judgment, two of them practically taking the place of the jury in civil causes in England.[2]

Different qualifications are required for these different branches of the legal profession, but the studies necessary for their attainment are in every case provided by the same schools of law. The student selects for himself, amongst the professors and lectures delivered, the particular professors and lectures on the subjects in which he must be qualified. In the case of *avoués*, notaries, and *huissiers*, the qualification of legal study is confined to the practical part of the law in which they will be called upon to exercise their functions, though it is customary for students studying for the lower branches of the law, who can afford the expense, and who have the preliminary education enabling them to enter the university, to take the same degree in law as that which is required for those who

[1] The magistracy is recruited from graduates in law who have passed through their three years' *stage* (see *infra*). They begin by being appointed supplementary judges or assistant public procurators in Courts of First Instance, and rise from these to higher appointments. The law, however, does not prevent the appointment of advocates to all posts in both branches of the magistracy, though there are relatively few instances of this having been done.

[2] I should mention that under French law the jury is a part of the system for the trial of criminal, as distinguished from correctional and civil, causes. The Correctional Court sits for the trial of *délits*, the nearest equivalent of which in English is misdemeanour, without a jury.

are entering its upper branches—that is, the Bar and the magistracy. For the latter alone is a complete course of legal study required.

The law school, on the other hand, does not confine its teaching to the preparation of the student for a professional career in law. The study of the law is the university training of the well-to-do Frenchman, of the Frenchman who aspires to any of the higher grades of the administration, and of those who intend to offer themselves for the diplomatic or consular service.

Thus official instruction in the law in France is not directly connected with any profession. The law faculty of the university, in which it is given, is like the faculty of arts or science. The aim is to afford the student the means of acquiring knowledge in all departments of the law. These different departments, however, are co-ordinated to enable the student to study law systematically, and, if he wishes, to conclude his studies by taking the degree which qualifies him for the higher branches of the profession, or to certify that he possesses that knowledge of principles and theory apart from practice which the French consider as indispensable to a man who has to apply the law as a public official.

Faculties of Law: The "Licence en Droit."—There are thirteen complete faculties of law in France. Of these, I can only speak from personal experience of one, viz., Paris, where I studied; but I may add that the other faculties only differ from that of Paris in being organised on a smaller scale.

The Paris faculty is composed of twenty-nine professors, three assistant professors, and six supplementary professors in the active exercise of their functions. The teaching of these professors is distributed with a view to enable the student to take the degree of *licencié en droit* as the termination of an ordinary three years' course of university study. There is an examination at the end of each year, and no student for the degree of *licencié* can enter for any of the three examinations out of their prescribed order.

The subjects of the first year's study are as follows: *Roman Law.*—The lectures on this subject embrace the whole of the legal institutions of Rome, with a view to initiating the student into the part which history plays in the development of law. *History of French Civil and Constitutional Law.*—Here the idea is to awaken in the student that interest in tradition, and at the same time that critical understanding of laws by reference to their origin, which will bring him to respect their character without making him a slave to their form. In the same order of ideas there is a course of lectures for the first year's student in *Political Economy*, treated with regard to the current development of legislation, on the assumption that he will be enabled to understand a law better if he sees the reason of it. Lastly is included about one-third of the contents of the *Civil Code*, in which the lecturer endeavours again to explain why the law is as it is, and, as far as possible, to connect its provisions with the ethical basis upon which it rests.

The second year's study includes another one-third, approximately, of the matters treated in the *Civil Code.* The study of *Roman Law* continues, but in this year it is treated with special reference to what contemporary French law has borrowed from it. In this year, also, the student must attend the lectures on *Criminal Law*, *Administrative Law*, and *Public International Law.*

In the third year he takes the remaining one-third of the contents of the *Civil Code*, and *Commercial Law*, *Private International Law*, and *Civil Procedure.*

The examinations are oral, except short essays on some points of practical law, which are written on the spot, and are not in the nature of a thesis.

The Doctorate of Law.—Above the *licence en droit* is a higher examination, called the doctorate of law. For this examination, which follows the *licence*—that is to say, no one who is not a *licencié en droit* can present himself for the examination in the doctorate—the subjects are practically the same, except that the knowledge required is more far-reaching. In Roman law, the lectures for the doctorate include the digest, and the lecturers on the civil and criminal codes introduce comparisons with other legislations. The only real addition to the matters for the doctorate is a thesis on some subject fixed in accord with one of the professors, who undertakes to preside at a sitting at which the candidate "defends" the conclusions arrived at in his thesis. A jury of the faculty is appointed, with three weeks' notice to the candidate to appear before them, and unless the candidate shows that he thoroughly understands what he has presumed to write upon, he is not admitted to the degree. Some of these theses are valuable documents, and have made the reputation of the candidate before he has left the university.

"**Agrégation.**"—Above the doctorate is the *agrégation*, or the competition for the post of supplementary professor or *agrégé*, in which the candidate not only writes a thesis, but also delivers test lectures on the branch of law he has chosen. This higher examination for the professorate can only be passed by doctors in law.

Qualification for Bar.—No Frenchman is entitled to call himself an advocate, or to practise as such before the French Civil and Correctional Courts or the Court of Assize, unless he has passed the *licence en droit*, and in addition has gone through a three years' *stage* of actual practice. This *stage*, however, is really of little or no import, inasmuch as a *stagiaire* is entitled to plead in Court in order to obtain the practice it is intended this so-called *stage* shall afford him.[1]

[1] In the decree of December 14th, 1810, the *stage* is described as the "assiduous attendance of the hearings in Court" (Art. 15). The *stagiaire* is also expected to attend the weekly "moots" presided over by the *bâtonnier* or dean of the "Order of Advocates." Lastly, litigants *in formâ pauperis* are committed to his care.

Wide Knowledge of the Law in France.—The teaching of the law in France in the manner I have described has had the effect of making the knowledge of its elements widespread among all classes of educated French society. In fact, an Englishman in France is amazed to see how general such knowledge is. I cannot say that it is "a dangerous thing." The merchant, the manufacturer, the sea captain, most average men in private life, will draw up—and fairly well—a contract or any ordinary legal undertaking without professional assistance; and if the laity can dispense with our services, we must, of course, be the last to complain! Nevertheless, fortunately for the French legal profession, the prevalence of amateurs does not seem to deprive professional men of work, for in no country are there more practising lawyers than in France.

I have endeavoured to give you as briefly as possible some idea of legal education and its connection with the legal profession in France, and this was all I was invited to do. As practical lawyers, however, you may expect me to add whether, according to my experience of some twenty years, the results of this education suggest any points in which it might serve as a model for Englishmen or for you.

Comparison of Systems.—The ground is treacherous. In comparing a French lawyer with an English or an American lawyer, it is easy to mistake as due to his special education a state of things really due to causes much deeper or lying quite outside it. Institutions seem only to produce their full effect on a nation when they become interwoven with its character, habits, and traditions, and on these an artificial institution like programme education may be long in producing a marked influence.

The qualifying degree for the highest branch of the legal profession, as you have seen, is the *licence*, obtained in the ordinary course after a study of three years. The intentions of those who drew up the successive programmes of study for this degree were excellent. The idea of giving the student a complete survey of law in all its elements and applications of general culture in a whole great department of human intellectual activity, is admirable. I am afraid, however, few students are gifted with a sufficient power of assimilation to derive much benefit from so exhaustive a course. The subjects are far too numerous to allow of the student ever mastering them, or any of them, properly, and the discipline of thoroughness is lost. Moreover, the French mode of education generally is defective in being directed too much to the acquisition of knowledge and too little to the acquisition of the power to think, to judge, and to act. Hence an English lawyer, with his wretched practical education, his almost total ignorance of principles, his incapacity to deal with a thought in law, is on an average a sounder and more sensible lawyer than the Frenchman. Perhaps this, to some extent, is due to the circumstance that in ninety-nine out of every hundred cases which come into the hands of the lawyer, matters of fact are of greater importance than matters of law, and that the training in life

of the young Englishman fits him better than any theoretical training in law can do to deal with matters of fact. Be that as it may, this is no reason why we should not do our best to promote a better and ever better legal education than we have.

Law is the outward manifestation of the national conscience, and, as such, is not only the study for professional practitioners, but is also properly a study for politicians, civil servants, statesmen, diplomatists, and all who have to administer it.

A complete faculty, after the fashion of the system in France, for the study of law as a branch of scientific inquiry, would certainly promote good legislation. To have such a faculty, composed of professors to whose knowledge the Legislature could appeal, and who more especially would serve as critics of existing laws, would be of priceless value to the nation.

As regards the examinations and education for the Bar, other things besides a knowledge of the principles of the law are necessary, and it is only, I believe, by severe mental discipline, and an ingenious combination of wide knowledge of things in general, as well as of law and actual practice in the work of the profession, that good, sensible lawyers, as heretofore, will continue to be made.

SOUDAN CRIMINAL LAW.

[*Contributed by* W. F. Craies, Esq.]

Enclosed in green covers, to soothe Muslim susceptibilities, given the force of law by the signature of Lord Kitchener of Khartoum, and issued from the National Printing Office at Cairo, the new Soudan Penal Code and Code of Criminal Procedure afford a significant proof of the effect of British control in the Khedive's dominions, and mark a long step towards the evolution of law and order out of the barbaric chaos of the Mahdi's tyranny.

Indian Models Followed.—Both codes are adapted from the Indian codes. This course has no doubt been deliberately chosen, not merely that the Criminal Law of the Soudan might be modelled on that of the ruling race, but because the Indian codes have been carefully framed for use among Muslims, and have stood the test of forty years' experience.

Treason Clauses.—When the Soudan was reconquered Lord Salisbury made a significant announcement, which implied a claim by Great Britain to have, at the least, a share in the territory then acquired, and this claim seems to be maintained in the frame of the clauses of the Penal Code dealing with treason, where a distinction is drawn between the Government of the Soudan and the Khedive of Egypt (see s. 93).

In the case of British conquests it has been a common practice to leave intact the Civil Law prevailing in the conquered territory, but to substitute English Criminal Law for that previously obtaining. This course was adopted in Quebec and in the captured Spanish West Indies; but there is a notable and, in some respects, an unfortunate exception, in the case of possessions acquired from the Dutch, where the Roman-Dutch Criminal Law has been allowed to continue in force.

In the Soudan there was ample justification for introducing a new and well-ordered system of Criminal Law and Procedure,—and policy and experience alike made it preferable to frame such system in accordance with Indian rather than with Continental precedents,—though we do not doubt that the Government of the Soudan deliberately and from motives of policy elected to frame and issue their codes in the English form and language, rather than adopt schemes framed by French lawyers or by judges of the mixed tribunals in Egypt.

Some Characteristics of the Code.—The statements already made with

respect to the origin of the codes render it unnecessary to go at any length into their details, and their special characteristics may be briefly indicated.

The Penal Code is to a large extent a replica of the great Indian Code, though perhaps not embodying its very latest amendments, and with certain excisions and rearrangements and attempts at re-drafting, and with some modifications of the law, apparently intended to adapt it to the prejudices or customs of the Soudanese, and some changes in the illustrations, to make them comprehensible to the Soudanese. The introduction of a "steam hooter" as an illustration of a noise which is, or is not, a nuisance, according as it is heard in a residential or a manufacturing district, throws an unexpected light on the industrial development of the country (see s. 204).

Its Extent.—The Code does not extend, *proprio vigore*, to the whole Soudan, but will take effect in such parts of the Soudan as the Governor-General may from time to time, by notice in the *Soudan Gazette*, order (s. 1). S. 2 renders the Code the sole criminal law for those parts of the Soudan in which it is in force, subject to the exigencies of Martial Law, where that is in force; and so soon as the Code comes into force in any part of the Soudan, it binds public servants throughout the Soudan, and becomes the personal law throughout the Soudan of persons "ordinarily resident" in a district to which it applies, and the personal law for all purposes for subjects of the Khedive domiciled in such a district (s. 3). This last proposition is probably intended to apply only to the acts or omissions of domiciled Egyptians in unsettled parts of Africa; but its terms are wide enough to make them liable in the Soudan under the Code for offences under it committed in any part of the world.

In connection with this general provision it is well to note s. 93, which provides for the abetting by persons in a part of the Soudan in which the Code is in force of offences against the law of a part of the Soudan in which the Code is not in force.

Arrangement.—Some sections included under general explanations are in the Indian Code, and we think more appropriately placed under particular titles. Such is the definition of provocation, which is s. 38 of the Soudan Code, but in the Indian Code appears as part of s. 300, under the head "Homicide." S. 56 of the Soudan Code differs from ss. 76-9 of the Indian Code, on which it is framed, by making that not an offence which is done by a person who in good faith believes himself to be bound by law to do it or justified in doing it. The Indian Code limits the exemption to cases where the belief arises "by reason of a mistake of fact and not by reason of a mistake of law." The change involves a departure from English law.

Offences against Religion.—In dealing with offences against religion, the lawgiver has omitted s. 298 of the Indian Code, as to the use of language, etc., with deliberate intent to wound the religious feelings of any

person. The omission is no doubt premeditated; and it gives the enthusiasts of Islam and Christianity freedom in proclaiming the demerits of their respective faiths.

The definitions of homicide have been re-drafted (Soudan, ss. 227, 228), but we think without substantial change.

Slave-dealing.—Slavery is not, *eo nomine*, prohibited; but ss. 279-90 are wide enough to cover most forms of it, and ss. 289 and 290, which we have not traced in the Indian Code, seem in effect to prohibit slave-catching and slave-dealing.

S. 289:

> Whoever kidnaps or abducts any person with intent that such person may be *unlawfully* compelled to labour against his will shall be punished with imprisonment, etc.

S. 290:

> Whoever, for money or money's worth, transfers, or purposes to transfer, the control of the person of any man or woman to another person with intent to enable such other person to unlawfully confine such man or woman, or to unlawfully compel him or her to labour against his or her will, shall be punished with imprisonment, etc.

Criminal Procedure.—The extent of the application of the Soudan Code of Criminal Procedure is regulated (see s. 1) in the same manner as that of the Penal Code; but it also applies to proceedings under laws other than the Penal Code, which contains no special regulations as to procedure (s. 2). It is a much abbreviated adaptation (containing two hundred and sixty-seven sections) of the Indian Criminal Procedure Code (Act V. of 1898), which contains five hundred and sixty-five sections, and, like that Act, has a most valuable schedule of offences under the Penal Code, showing the modes of lawful arrest, the Court of trial, and the lawful punishments.

There is no High Court for the Soudan. The highest Court of criminal jurisdiction is that of the *mudir*, corresponding to the Courts of Session in India (s. 4), and consisting of three magistrates, including the *mudir*, or a first-class magistrate, nominated by him to preside (s. 5). Four other classes of Courts are formed, as in India. The provisions as to arrest are very much the same as in India, substituting sheikhs and other local magnates for village headmen and the like. The statement of the charge and the procedure as to joinder of offences, amendment, etc., is almost exactly that of India. The charge may be framed in English or in Arabic. Trials are conducted as a general rule in Arabic, and the two higher Courts are in the main regulated by the procedure on a court-martial under Egyptian military law (ss. 156, 157), and there is no jury. All judgments of a minor district Court are submitted to the *mudir* for confirmation, and all judgments of the *mudir's* Court are submitted to the Governor-General (ss. 181, 182),

and the convict is entitled in any such case to appeal to the confirming authority.

Compensation for False Arrest.—There is a provision common to both codes (Soudan, s. 263; Indian, s. 553) which might well be imitated in England—*viz.* that empowering a magistrate who has summarily tried a case in which a man has been groundlessly arrested to award him a small sum to be paid by the prosecutor in compensation for the loss of time and cost consequent on the arrest.

There is little doubt that those who have to frame codes for British possessions in comparatively unsettled districts will find these codes useful aids to be used in conjunction with the Colonial Office Model Code.

SKETCH OF THE OTTOMAN LAND CODE FOR CYPRUS.[1]

[*Contributed by* Mr. Justice Middleton.]

Land Laws of Cyprus.—At the occupation of Cyprus by Great Britain on July 13th, 1878, the law relating to land found in force there was the Ottoman Land Code, which was promulgated by Sultan Abdul Mejid on Ramazan 7th, 1274, or April 21st, 1858. As to the law affecting land which prevailed in Cyprus before that date it is almost impossible to obtain any reliable information; but it is probable that it consisted of the Sheri, or religious law, Imperial Irades, or orders, and Fetvas, or opinions of the Sheikhs-ul-Islam and Muftis, based on, or independent of, such orders, which were construed and enforced by the local Sheri or religious Courts in conformity with the religious law. The Land Code itself, as I am informed, is a compilation and codification of the various Irades and Fetvas issued previously by the Imperial and high religious authorities above referred to. Following on the Land Code came a number of laws, regulations, and instructions, which together with the Land Code have been translated into English by Mr. Frederick Ongley, Assistant to the Registrar-General in the principal Land Registry Office, and compiled in one volume.[2]

Since the occupation the Land Code and these regulations, etc., have been to a small extent amended by local legislation, but the former still remains the guiding authority under which all matters relating to land are adjusted and administered in the Courts and by the Government of the island. An attempt has been made to give an outline of the principal provisions of the code as they affect the different kinds of land known in the Ottoman Empire, and more particularly as they are applied in Cyprus. It has often been, and no doubt will be in future, a matter of extreme difficulty to give a reasonable construction to some of the more obscure

[1] Mr. Gaspard Amirayan, Barrister-at-law of the Inner Temple, Registrar of the Supreme Court of Cyprus, and an accomplished Turkish scholar, having been kind enough to read through this short sketch for me, it may, I think, be safely assumed that the Turkish words expressed in Roman characters are correctly written and translated.

[2] Clowes & Sons.

articles of this code, and the Supreme Court[1] has found no inconsiderable difficulty in doing so.

It has to be borne in mind, also, that Cyprus is still a portion of the Ottoman Empire; and Ottoman Law,[2] as found in existence upon the occupation, is still in force in the island. But by the Cyprus Courts of Justice Order, 1882, no amendment of the Land Code, or in fact of any Ottoman law made by Ottoman authority, would be applicable to Cyprus if made after July 13th, 1878.

Different Kinds of Land in Ottoman Empire.—Land in the Ottoman Empire is divided according to the Ottoman Land Code into five great categories :

1. Erazi-i-Mirié (literally, "Treasury or Exchequer land"), which comprises the bulk of the land in Cyprus and from which certain of the Vaqf (literally, "detention"; technically, "dedication") lands and some of the Erazi-i-Memlouké (or "land of *plenum dominium*") have been severed by patent from, or permission of, the sultans. This kind of land was formerly held by the permission of the possessors of the feudal fiefs called Timars[3] and Ziamets,[4] who were considered the *domini soli*, and for a certain time by the grants of Multezims (tax-farmers for a term) and Muhassils (grantees for the right of collecting taxes both in a Kaza, or district, and in a Sanjak, now a province of the second class). These being subsequently abolished, Erazi-i-Mirié is now held by the permission of the official appointed by the Government for the purpose, as representing the State, who is usually the head of the local Land Registry Office. It is of this kind of land that the Land Code mainly treats.

2. Erazi-i-Memlouké (literally, "land of *plenum dominium*"), commonly called "Mulk," which comprises—

(*a*) Building sites within a town or village, and places on the border of a town or village not exceeding half a *donum*, or about one-eighth of an English acre in extent.

(*b*) Land separated from Erazi-i-Mirié, and granted by patent of the Sultan to be held with *plenum dominium* in accordance with the terms of the Sheri, or religious law.

(*c*) Erazi-i-Ushrié (literally, "tithe-paying land"), land given to and

[1] The decisions of the Supreme Court from 1883 to 1898 are reported in four volumes published by the Government under the authority of the judges.

[2] Where not repealed or amended by Cyprus Statute Law.

[3] Timar : a feudal fief of a nominal yearly value not exceeding 19,999 *aqches*.

[4] Ziamet : a feudal fief of a nominal yearly value ranging between 20,000 and 100,000 *aqches*. The possessors of these fiefs held them usually on grants for life, and were not removed unless they committed serious offences. Besides their military and administrative duties, they enjoyed the privileges of collecting the tithe due on the land, of carrying out all transactions relating to the transfer of land on its alienation or transmission by inheritance, of collecting of fees, of granting out the lands that have been vacated, and of issuing title-deeds. The holder of a Ziamet had to supply a horse-soldier for every 5,000 *aqches*, and the holder of a Timar a foot-soldier for every 3,000 *aqches*.

distributed amongst the Moslem conquerors at the time of a conquest.

(*d*) Erazi-i-Kharajié (literally, "land left in the hands of the original non-Moslem owners at the time of a conquest").

If an owner of these two latter classes dies without heirs, the land vests in what is known as the Beit-ul-Mal (literally, "house of property," or Public Treasury of Islam), and falls into the category of Erazi-i-Mirié.

What is called the Raqabé (literally, "nape of the neck," or "slave"; technically, "the substance of the soil and its full proprietorship") of all Erazi-i-Memlouké belongs to the owner of it, who in fact has *plenum dominium* over it. It is inherited like movable property, and is subject to the provisions of Vaqf, mortgage, gift, and pre-emption. The provisions of the Land Code do not apply to Erazi-i-Memlouké as such.

3. Erazi-i-Metrouké (literally, "abandoned land") comprises—

(*a*) Land left and dedicated to the public, such as public roads;

(*b*) Land left and assigned to the inhabitants of villages or towns as a body, such as pasture-lands.

4. Erazi-i-Mevat (literally, "dead or waste land"), which is in nobody's possession, and not having been left or assigned to the inhabitants, is so far from a town or village that the loud voice of a person from the nearest inhabited spot cannot be heard there. The code further specifies the distance between the two points as about one mile and a half,[1] which is supposed to be traversed in about one hour and a half.

5. In addition to these four original categories of land there are the Erazi-i-Mevqoufé (literally, "stopped"; technically, "dedicated, or Vaqf lands"), comprising a considerable portion of the soil of the Empire; but as these lands are mainly derivative from or carved out of the Erazi-i-Mirié and Erazi-i-Memlouké, they are really of a secondary and compound character, and cannot, it is submitted, properly speaking, be classed with the four great primary divisions already mentioned.

Varieties of the Erazi-i-Mevqoufé Land.—The Erazi-i-Mevqoufé are divided into two classes:

(*a*) Vaqfs created out of Erazi-i-Memlouké by their owners, who have dedicated them wholly or partly to religious objects in accordance with the terms of the Sheri, or religious law. These are known as pure Vaqfs, and they are not governed by, nor subject to, the provisions of the Land Code, and all litigation respecting them must take place in the Sheri Courts.

(*b*) Vaqfs separated from Erazi-i-Mirié by or with the permission of the sultans, who by so doing allow the tithes and taxes thereon due to the State to be dedicated wholly or partly to some religious object. This category of Erazi-i-Mevqoufé is called Takhsisat

[1] One Turkish mile is practically the time that an animal such as a donkey takes to walk three English miles, or one hour English.

(literally, "assignments, endowments"), and forms the bulk of the Vaqf property in the Ottoman Empire.

The provisions of the Land Code apply to this class of Vaqfs; and whenever the words Erazi-i-Mevqoufé are mentioned therein, it is this class which is meant; but the Evqaf (Arabic plural of Vaqf) Department stands to them in the same position which the State, represented by the Beit-ul-Mal, or Treasury, occupies as regards Erazi-i-Mirié, and receives all the dues and fees legally payable on the land.

There is also another kind of this class of Erazi-i-Mevqoufé in which the dedication is limited either to the right of possession alone or to that right plus the tithes and taxes. The Land Code does not apply to the sale and inheritance of this sort of Erazi-i-Mevqoufé, and it is not necessary to notice it further.

The dedication of Erazi-i-Mevqoufé must be such as to make it either a Mazbouta (literally, "controlled") or non-Mazbouta or Mulhaqa (literally, "annexed") Vaqf.

Mazbouta Vaqfs are those in which the appointment of trustees and direct management is vested in the Evqaf Department, or if the appointment of trustees is vested in the beneficiary the management only is carried out by the Evqaf Department. Mulhaqa or non-Mazbouta Vaqfs are those which are administered by the Mutevellis, or trustees, under the supervision of the Evqaf Department, and "annexed" to that department probably for the prevention of fraud in their administration. It is not necessary or possible in a short sketch of this kind to consider further the attributes of, regulations, and laws relating to the administration of Vaqfs,[1] which are somewhat voluminous; but it was hardly possible to describe that kind of Erazi-i-Mevqoufé to which the Land Code is applicable without mentioning shortly the other kinds and their main divisions.

Erazi-i-Mirié Land.—The theory of the compilers of the Land Code as regards Erazi-i-Mirié appears to be that the *dominium* of such land always remains in the State, and that its Raqabé belongs to the Beit-ul-Mal as representing the State. Figuratively speaking, the Raqabé, or "the nape of the neck," is under the yoke of the State, and all transactions or dealings with it are subject to the approval of what is called the "competent authority"—usually the head of the Land Registry Office; while upon its sale or transfer by inheritance the State is entitled to exact fees and dues, or upon its becoming Mahloul, or vacant, for lack of heirs or other reason, it reverts to the State. The nature of the tenure of Erazi-i-Mirié perhaps more nearly approaches that of land held under the contract of *emphyteusis* known to the Romans; but the converse of the rule of English and Roman

[1] A treatise on the laws of Evqaf by Omer Hilmi Effendi has been translated by C. R. Tyser, Esq., President of the District Court of Kyrenia, and Mr. G. D. Demetriades, Registrar of that Court, and was published by the Government of Cyprus last year.

Law, "Solo cedit quod solo inaedificatur," prevails under the Turkish Land Code, as I think will appear later on.

The possession of Erazi-i-Mirié, appertaining to a town or village, cannot be granted *en bloc* to the inhabitants generally, nor can it be given so to any one or more of the inhabitants by selection. It must be granted so that all the inhabitants may, if they so desire it, share in it.

The main object of its grant[1] by the State is, that it may be cultivated, and produce revenue to the State in the shape of tithes and land tax; and a cultivator and tax-payer, even though a trespasser as regards the rightful possessor, is not liable for mesne profits or deterioration. According to the code, if the land is allowed to remain uncultivated for three years by its possessor without valid excuse, such as recuperation, inundation by water, or the capture in war of its possessor, it can be resumed by the State, which can give it back to its former holder on his paying the Bedel-misl,[2] should he desire it, or, if not, transfer it after auction to the highest bidder. The harshness of this provision has been modified in Cyprus by extending the period of non-cultivation to ten years. The Erazi-i-Mirié of soldiers on active service, minors, and idiots is not liable to forfeiture for non-cultivation. The possessor of Erazi-i-Mirié may not make bricks or tiles of the soil, nor make it into a garden, vineyard, or wood, nor plant trees, nor build on the land, nor may he or any one else bury a corpse on the land without the permission of the competent State official.[3] It has also been gravely doubted by the Supreme Court of Cyprus if a well can be dug on land of this category without such authority. The foregoing prohibitions can be enforced by the State by the exaction of compensation and by the uprooting, demolition, and removal of the forbidden things; but this, it is believed, is rarely done, and certainly only on the ground of a serious interference with some public or private interest in Cyprus.

An important exception is made in the case of gardens of fruit-bearing trees and vineyards planted on Erazi-i-Mirié without the necessary permission. If these have existed for three years without the interference of the State, they obtain a legal status as if they had been planted by permission, and are not subject to the land, but become the Mulk, or full property, of their originator, and by the code the tithe is assessed and levied on their produce.[4] No such privilege appears to appertain to the planting of woods or building houses without permission; but it is probable that unless the doing so involved some grave breach of either public or private interests, they would be allowed to remain, and the tax in lieu

[1] The provisions of the code seem to imply this.

[2] Bedel-misl: literally, "equivalent value"; but according to one of the regulations it means the estimated value fixed by impartial experts.

[3] These restrictions are not enforced in Cyprus as a general rule

[4] By the Taxation Amendment Law, 1884, the tithe on grapes in Cyprus was abolished from and after March 13th, 1884.

of tithe on the land occupied by them would be duly assessed and levied. The peculiarity of all planting and erection on Erazi-i-Mirié with the permission or assent of the competent authority is, that the land becomes subject, as it is called, to the things put upon it, and that they, together with the land *actually* occupied by them, for the time being, become Mulk, or full property, and are governed by the laws relating to the inheritance, etc., of such property. When the land is again free of them by the drying up, or uprooting of the trees, or the ruin of the buildings beyond a sign of construction, it reassumes its character of Erazi-i-Mirié, and their late owner, if he desires it, has a preferential right to a re-grant of the land upon paying the Bedel-misl to the Beit-ul-Mal. If, however, the land has been in his possession as Erazi-i-Mirié before it was occupied by trees, vines, or buildings, then he can retain it without any payment to or objection from the Beit-ul-Mal. The code also contemplates the possession of the land by one person, while the owner of the trees or buildings is another; and here again the subjection of the land to the Mulk on it is emphasised by the fact that the owner of the Mulk has a preferential right to become the possessor of the Erazi-i-Mirié upon which the Mulk stands, should the possessor of the Erazi-i-Mirié desire to alienate it. Trees growing naturally on Erazi-i-Mirié, such as the valonia, walnut, yoke-elm, and oak, are, on the contrary, subject to the land, and their profit belongs to the possessor of the land, who has, however, to pay a tithe on the produce of fructiferous trees.[1]

Originally the possessor of Erazi-i-Mirié bearing trees growing naturally could not cut them down or deal with their timber without paying the value of them to the Treasury. By a later law, however, this restriction has been abrogated, and the lawful possessor of the soil is now at liberty, in Cyprus, to deal with trees of this kind as he chooses. Erazi-i-Mirié cannot be held either by corporate bodies or trustees. The reason for this prohibition is no doubt to prevent the loss of revenue in fees payable on inheritance.

Acquisition of Erazi-i-Mirié.—Throughout the Ottoman Empire a system of land registration is in force which, if it were honestly and accurately carried out, would no doubt be a serviceable one. The headquarters of the department is called the Defter Khane-i-Khaqani, and is situate in Stamboul. Each Vilayet, Sanjak, or Liva, and Kaza, which are the three administrative divisions into which the Empire is divided and sub-divided, has its Land Registry Office, the Kaza subordinate to the Sanjak or Liva, and the latter, if not directly responsible to the central authority at Stamboul, subordinate to the Vilayet, in its turn responsible to headquarters.

In Cyprus there are five local offices and one principal Land Registry Office, presided over by an English official called the Registrar-General; and

[1] By the Reform of Taxation Law, 1897, figs, lemons, citrons, oranges, pomegranates, and various other products were freed from the payment of tithe.

title-deeds are issued by these offices mainly in conformity with the regulations laid down by the Ottoman Government, and found in force in Cyprus upon its occupation by England. There is of course now no reference to Stamboul, and much greater accuracy and care is displayed in the registering of new titles and cancelling of old ones than prevailed under the Ottoman administration. There is still, however, large scope for improvement; but it is feared that no system, however good it might be, could be accurately worked until a proper cadastral survey has been made of the island. According to the law in force, no person is permitted to hold Erazi-i-Mirié without a title-deed. The possessor of Erazi-i-Mirié can only validly alienate to another with the permission of the competent State official, who is usually the chief of the local Land Registry Office in Cyprus, the transaction being duly registered and a new title-deed given to the alienee.

Upon alienation of Erazi-i-Mirié the trees growing naturally on it pass with the land, without the necessity of any mention being made of them upon the transfer before the proper official. But Mulk trees thereon do not pass, unless at the time of the sale the alienor states that he sells them also. Sales and mortgages in Cyprus must be carried out by a written declaration of sale or mortgage made by the vendor and purchaser, or mortgagor and mortgagee, and declared by them to be true in the presence of a land registry officer charged with that office, who passes it on with the necessary evidence of the vendor's ownership, identity, and due payment of taxes up to date into the Land Registry Office, where registration takes place, and whence new title-deeds are issued if the transaction is found to be in order.

Erazi-i-Mirié can also be acquired by uninterrupted possession for a period of ten years; and if this is proved to the satisfaction of the local Land Registry Office a title-deed will be granted for it. If, however, the former possessor was under certain disabilities, such as madness, or minority, or absence in a distant country, he can, according to the code, vindicate by action his legal rights to the possession of the land for a period of ten years following the cessation of the disability under which he was labouring. This period of ten years has by Cyprus Statute Law[1] been reduced to five, and by the same legislative authority the possession of Erazi-i-Mirié, coupled with registration for ten years, gives an indefeasible title; while no action is maintainable against an unregistered adverse possessor of Erazi-i-Mirié for ten years, unless the person instituting such action has been lawfully entitled to be and has been actually registered for such land during some part of the time of such adverse possession. It is believed, however, that this last enactment would in practice be in some cases unworkable.

The fee payable to the Government Treasury on a sale of Erazi-i-Mirié is 5 per cent. on the sale price in addition to the registration fee.

[1] The Immovable Property Limitation Law, 1886, as amended by Law V. of 1887.

Transmission of Erazi-i-Mirié by Inheritance.—Erazi-i-Mirié descends to the heirs of its possessor in the following order:

(1) To the children; the children of a deceased child taking their parent's share.

(2) To the grandchildren.

(3) To the parents or parent.

(4) To the brothers by same father, whether by the same or a different mother.

(5) To the sisters by the same father, whether by the same or a different mother.

(6) To the brothers by the same mother.

(7) To the sisters by the same mother.

(8) To the surviving spouse, provided that the surviving spouse takes a share of one-quarter with the heirs under Nos. 3, 4, 5, 6, and 7.

Erazi-i-Mirié cannot be transmitted by will.

The Erazi-i-Mirié of a Mussulman cannot be inherited by a non-Mussulman heir, and *vice versâ*; nor can the murderer inherit that of the person he has murdered. By the Land Code the Erazi-i-Mirié of an Ottoman subject cannot be inherited by an heir who is a foreign subject, nor can the Erazi-i-Mirié of a person who has abandoned his Ottoman nationality pass to his heirs, whether they are Ottoman or foreign subjects, but escheats to the State as Mahloul, or vacant land. It would seem, however, now, that under certain laws which have been passed in the Ottoman Empire on the subject of Ottoman nationality, some of which are applicable to Cyprus, this latter restriction may have been modified.

The fee payable to the Government Treasury on transmission by inheritance of Erazi-i-Mirié is $2\frac{1}{2}$ per cent. on the registered value, in addition to the registration fee.

Mahloulat, or Vacancies.—If Erazi-i-Mirié becomes unoccupied or vacant by the failure of heirs, as above indicated, and there being no persons having a Tapou right on it, as it is called, it then escheats to the State, and can be re-granted by sale to the highest bidder.

The right to Tapou means a preferential right to become possessed of the land on payment to the State of its Tapou or equivalent value. This right can be claimed for a period of ten years in case of persons owning Mulk buildings or trees on the land, or inheriting such property as next-of-kin—for five years by partners of a deceased possessor, and for one year by inhabitants of the village in which the land is situated, dating from the death of its deceased possessor.

Mortgage and Forced Sale of Erazi-i-Mirié for Debt.—Erazi-i-Mirié cannot be pledged, but can be alienated (Firagh-bil-Shart [1]—literally, "transfer

[1] It is difficult from the language of the text to understand the difference between these two forms of mortgage, and the commentators universally agree that they are identical; but Firagh-bil-Vefa is the form in constant use in the Ottoman Empire.

on condition") against a debt, by permission of the official, on condition that when the debt is paid the land is returned; or it can be mortgaged by way of Firagh-bil-Vefa (literally, "transfer on trust"), some person being appointed—generally the creditor—as a Vekil, or agent, to sell, unless the debt is paid within the time limited by the mortgage. In the latter case the debtor can always claim restitution of the land on payment of the debt till it is sold by the Vekil.

By the Law of Ramazan 23rd, 1286, or December 27th, 1869, the mortgaged land can now be sold even after the death of the debtor without heirs; but, by the Ottoman Land Code, in such a case it became Mahloul, or vacant, and followed the procedure applicable to that sort of land. By the same law, if the debtor died before paying the mortgage-debt, it became exigible in the first instance from his movable property, and the mortgagee was limited to the land mortgaged for the recovery of his debt.

The procedure for mortgaging Erazi-i-Mirié is now regulated in Cyprus by Law XIX. of 1890, and is in most respects the same as that to be followed on sale; and as by the Law concerning the Sale of Immovable Property for Debt, dated Shevval, 1288, or December, 1871, Erazi-i-Mirié can be sold, like movables, for a judgment-debt without the consent of the debtor, it is possible now for the mortgagee, if he claims and proves his debt in an action, to obtain a judgment which will enable him not only to sell the land mortgaged, but also any other unencumbered land which the debtor may have for the payment of the debt which was secured by the mortgage. Under the law in force in Turkey, however, a house appropriate to the debtor's position in life is exempt from sale; while if he is a farmer, a sufficient quantity of his land for the maintenance of such a house, to be determined by the Court hearing the action, must be left to him.

This latter beneficent exemption of an autocratic Government has been abolished by the Legislature of Cyprus,[1] and the whole of any debtor's immovable property there is now liable to be sold in execution of a judgment, with the exception only "of sufficient house accommodation for the debtor and his family."

Erazi-i-Mevat.—This class of land can be opened up and turned into arable land in exchange for the right to possess, with the permission of the competent authority; and its Raqabé belongs to the Beit-ul-Mal, and it is governed by all the provisions of the Land Code applicable to Erazi-i-Mirié. If the new occupier does not cultivate it for three years, and has no valid excuse for leaving it in its original state, the land can be given to another person. If any one opens up Mevat land without permission, it can be granted to him on his paying the Bedel-misl, and a title-deed is given to him.

[1] Law X. of 1885, s. 48.

Erazi-i-Metrouké.—This category of land, to which communal forests, or Baltalyks, public roads, places of worship, public places for putting carts and animals, market and fair places, village pasture-lands, village summer and winter grazing-places (Yaïlaks and Kishlaks) belong, is mentioned specifically in the Land Code; but as these places cannot be individually possessed, bought, sold, inherited, or used for any other purpose than that for which they were destined and assigned *ab antiquo*, the general provisions of the code do not apply to them.

THE AUSTRALASIAN FEDERATION BILL.

In view of the fact that the Bill to constitute the Commonwealth of Australia is about to be submitted to Parliament, it has been thought fit to print the measure. The Bill to constitute the Commonwealth of Australia, which was framed by the Convention which sat in Adelaide in 1897, and in Sydney and in Melbourne in 1898, and was amended by the Conference of Premiers at Melbourne in 1899, was finally adopted on a Referendum to the electors in the colonies of New South Wales, Victoria, Queensland, South Australia, and Tasmania in 1899. It has been transmitted to England on Addresses to Her Majesty from both Houses of Parliament in each of the five colonies, praying that it may be passed into law by the Imperial Parliament. The text given is that which appears in the second schedule to the Australasian Federation Enabling Act, passed by the Legislature of Victoria in July, 1899. Alterations from the original text are shown by black letters when new matter is introduced, and by underlining any old matter which is omitted from the measure adopted.

DRAFT OF A BILL

To Constitute the Commonwealth of Australia.

[ ]

Whereas the people of [*here name the Colonies which have adopted the Constitution*], humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows:—

I. This Act may be cited as *The Commonwealth of Australia Constitution Act.*

II. This Act shall bind the Crown, and its provisions referring to the Queen shall extend to Her Majesty's Heirs and Successors in the Sovereignty of the United Kingdom.

III. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being

later than one year after the passing of this Act, the people of [*here name the Colonies which have adopted the Constitution*] shall be united in a Federal Commonwealth under the name of "The Commonwealth of Australia." But the Queen may, at any time after the Proclamation, appoint a Governor-General for the Commonwealth.

IV. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several Colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

V. This Act, and all laws made by The Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

VI. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"Colony" shall mean any colony or province.

"The States" shall mean such of the Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the Northern Territory of South Australia, as for the time being are parts of the Commonwealth, and such Colonies or Territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called a "State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

VII. *The Federal Council of Australasia Act* 1885 is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by The Parliament of the Commonwealth, or as to any Colony not being a State by the Parliament thereof.

VIII. After the passing of this Act the *Colonial Boundaries Act* 1895 shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

IX. The Constitution of the Commonwealth shall be as follows:—

THE CONSTITUTION.

This Constitution is divided as follows:—

CHAPTER I.—THE PARLIAMENT:
PART I.—General:
PART II.—The Senate:
PART III.—The House of Representatives:
PART IV.—Both Houses of The Parliament:
PART V.—Powers of The Parliament.
CHAPTER II.—THE EXECUTIVE GOVERNMENT:
CHAPTER III.—THE JUDICATURE:

CHAPTER IV.—FINANCE AND TRADE:
CHAPTER V.—THE STATES:
CHAPTER VI.—NEW STATES:
CHAPTER VII.—MISCELLANEOUS:
CHAPTER VIII.—ALTERATION OF THE CONSTITUTION.
THE SCHEDULE.

CHAPTER I.

THE PARLIAMENT.

Part I.—General.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until The Parliament otherwise provides, shall be ten thousand pounds.

The salary of a Governor-General shall not be altered during his continuance in office.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

5. The Governor-General may appoint such times for holding the sessions of The Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue The Parliament, and may in like manner dissolve the House of Representatives.

After any general election The Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

6. There shall be a session of The Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of The Parliament in one session and its first sitting in the next session.

Part II.—The Senate.

7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until The Parliament otherwise provides, as one electorate.

But until The Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until The Parliament otherwise, provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by The Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

13. As soon as may be after the Senate first meets and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable: and the places of the senators of the first class shall become vacant at the expiration of the third year, and the places of those of the second class at the expiration of the sixth year, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made in the year at the expiration of which the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of January following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of January preceding the day of his election.

14. Whenever the number of senators for a State is increased or diminished, The Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

20. The place of a senator shall become vacant if for two consecutive months of any session of The Parliament he, without the permission of the Senate, fails to attend the Senate.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President, or if the President is absent from the Commonwealth, the Governor-General shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

22. Until The Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

PART III.—THE HOUSE OF REPRESENTATIVES.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until The Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

I. A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators.

II. The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

26. Notwithstanding anything in section twenty-four the number of members to be chosen in each State at the first election shall be as follows: [*To be determined according to the latest statistical returns at the date of the passing of the Act, and in relation to the quota referred to in previous sections.*]

27. Subject to this Constitution, The Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

29. Until The Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

30. Until The Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of the Parliament of the State; but in the choosing of members each elector shall vote only once.

31. Until The Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives, or from the proclamation of a dissolution thereof.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker, or if he is absent from the Commonwealth, the Governor-General in Council may issue the writ.

34. Until The Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

I. He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:

II. He must be a subject of the Queen, either natural-born or for at least five years naturalised under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

37. A member may by writing addressed to the Speaker, or to the Governor-General, if there is no Speaker, or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

38. The place of a member shall become vacant if for two consecutive months of any session of The Parliament he, without the permission of the House, fails to attend the House.

39. Until The Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

Part IV.—Both Houses of The Parliament.

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State, shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of The Parliament of the Commonwealth.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the Schedule.

43. A member of either House of The Parliament shall be incapable of being chosen or of sitting as a member of the other House.

44. Any person who—

I. Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

II. Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

III. Is an undischarged bankrupt or insolvent: or

IV. Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

V. Has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth, otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or as a member of the House of Representatives.

But sub-section IV. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

45. If a senator or member of the House of Representatives—

I. Becomes subject to any of the disabilities mentioned in the last preceding section: or

II. Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

III. Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in The Parliament to any person or State:

his place shall thereupon become vacant.

46. Until The Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of One hundred pounds to any person who sues for it in any court of competent jurisdiction.

47. Until The Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of The Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

48. Until The Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of Four hundred pounds a year, to be reckoned from the day on which he takes his seat.

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by The Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

50. Each House of The Parliament may make rules and orders with respect to—

I. The mode in which its powers, privileges, and immunities may be exercised and upheld:

II. The order and conduct of its business and proceedings either separately or jointly with the other House.

Part V.—Powers of The Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to—

I. Trade and commerce with other countries, and among the States:

II. Taxation; but so as not to discriminate between States or parts of States:

III. Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

IV. Borrowing money on the public credit of the Commonwealth:

V. Postal, telegraphic, telephonic, and other like services:

VI. The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

VII. Light-houses, light-ships, beacons, and buoys:

VIII. Astronomical and meteorological observations:

IX. Quarantine:

X. Fisheries in Australian waters beyond territorial limits:

XI. Census and statistics:

XII. Currency, coinage, and legal tender:

XIII. Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

XIV. Insurance, other than State Insurance; also State Insurance extending beyond the limits of the State concerned:

XV. Weights and measures:

XVI. Bills of exchange and promissory notes:

XVII. Bankruptcy and insolvency:

XVIII. Copyrights, patents of inventions and designs, and trade marks:

XIX. Naturalisation and aliens:

XX. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

XXI. Marriage:

XXII. Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

XXIII. Invalid and old-age pensions:

xxiv. The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States :

xxv. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States :

xxvi. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws :

xxvii. Immigration and emigration :

xxviii. The influx of criminals :

xxix. External affairs :

xxx. The relations of the Commonwealth with the islands of the Pacific :

xxxi. The acquisition of property on just terms from any State or person for any purpose in respect of which The Parliament has power to make laws :

xxxii. The control of railways with respect to transport for the naval and military purposes of the Commonwealth :

xxxiii. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State :

xxxiv. Railway construction and extension in any State with the consent of that State :

xxxv. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State :

xxxvi. Matters in respect of which this Constitution makes provision until The Parliament otherwise provides :

xxxvii. Matters referred to The Parliament of The Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law :

xxxviii. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia :

xxxix. Matters incidental to the execution of any power vested by this Constitution in The Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

i. The seat of Government of the Commonwealth, and all places acquired by the Commonwealth for public purposes :

ii. Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth :

iii. Other matters declared by this Constitution to be within the exclusive power of The Parliament.

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to

appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licenses, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may if it thinks fit make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by

an absolute majority of the total number of the members of the Senate and House of Representatives three-fifths of the members present and voting thereon, shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by **an absolute majority of the total number of the members of the Senate and House of Representatives** three-fifths of the members present and voting thereon, it shall be taken to have been duly passed by both Houses of The Parliament, and shall be presented to the Governor-General for the Queen's assent.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General, by speech or message to each of the Houses of The Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of The Parliament, or by Proclamation, that it has received the Queen's assent.

CHAPTER II.

THE EXECUTIVE GOVERNMENT.

61. The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

64. The Governor-General may appoint officers to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

65. Until The Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as The Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until The Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

67. Until The Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth, the following departments of the public service in each State shall become transferred to the Commonwealth :

Posts, telegraphs, and telephones :
Naval and military defence :
Light-houses, light-ships, beacons, and buoys :
Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony, or in the Governor of a colony with the advice of his Executive Council, or in any authority of a colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

CHAPTER III.

THE JUDICATURE.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as The Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as The Parliament prescribes.

72. The Justices of the High Court and of the other courts created by The Parliament :

I. Shall be appointed by the Governor-General in Council :
II. Shall not be removed except by the Governor-General in Council, on an

address from both Houses of The Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity.

III. Shall receive such remuneration as The Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as The Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

I. Of any Justice or Justices exercising the original jurisdiction of the High Court:

II. Of any other federal court, or court exercising federal jurisdiction: or of the Supreme Court of any State, or of any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

III. Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by The Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74. No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise, by virtue of Her Royal Prerogative, to grant special leave of appeal from the High Court to Her Majesty in Council. But The Parliament may make laws limiting the matters in which such leave may be asked.

75. In all matters—

I. Arising under any treaty:

II. Affecting consuls, or other representatives of other countries:

III. In which the Commonwealth, or a person suing or being sued on behalf or the Commonwealth, is a party:

IV. Between States, or between residents of different States, or between a State and a resident of another State:

V. In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth—

the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

I. Arising under this Constitution, or involving its interpretation:

II. Arising under any laws made by The Parliament:

III. Of admiralty and maritime jurisdiction:

IV. Relating to the same subject-matter claimed under the laws of different States.

77. With respect to any of the matters mentioned in the last two sections, The Parliament may make laws—

I. Defining the jurisdiction of any federal court other than the High Court:

II. Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States:

III. Investing any court of a State with federal jurisdiction.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79. The federal jurisdiction of any court may be exercised by such number of judges as The Parliament prescribes.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as The Parliament prescribes.

CHAPTER IV

FINANCE AND TRADE.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of The Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for The Parliament.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from

office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

85. When any department of the public service of a State is transferred to the Commonwealth—

I. All property of the State, of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary.

II. The Commonwealth may acquire any property of the State, of any kind, used, but not exclusively used, in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth.

III. The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by The Parliament.

IV. The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. **During a period of ten years after the establishment of the Commonwealth and thereafter until The Parliament otherwise provides** of the net revenue of the Commonwealth from duties of customs and of excise, not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

89. Until the imposition of uniform duties of customs—

I. The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth:

II. The Commonwealth shall debit to each State—

(*a*) the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth:

(*b*) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth:

III. The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

90. On the imposition of uniform duties of customs the power of The Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect; but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, One thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of The Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until The Parliament otherwise provides—

I. The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State:

II. Subject to the last sub-section, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

94. After five years from the imposition of uniform duties of customs, The Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

96. **During a period of ten years after the establishment of the Commonwealth and thereafter until The Parliament otherwise provides, The Parliament may grant financial assistance to any State on such terms and conditions as The Parliament thinks fit.**

97. (96.) Until The Parliament otherwise provides, the laws in force in any colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the colony, or the Government or an officer of the colony, is mentioned.

98. (97.) The power of The Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

99. (98.) The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

100. (99.) The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

101. (100.) There shall be an Inter-State Commission, with such powers of adjudication and administration as The Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

102. (101.) The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State: due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the

meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless adjudged by the Inter-State Commission.

103. (102.) The members of the Inter-State Commission—

I. Shall be appointed by the Governor-General in Council:

II. Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of The Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity;

III. Shall receive such remuneration as The Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

104. (103.) Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

105. (104.) The Parliament may take over from the States their public debts as existing at the establishment of the Commonwealth, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

CHAPTER V.

THE STATES.

106. (105.) The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. (106.) Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in The Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the States, as the case may be.

108. (107.) Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of The Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by The Parliament of the Commonwealth the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the colony had until the colony became a State.

109. (108.) When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

110. (109.) The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the Government of the State.

111. (110.) The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

112. (111.) After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by The Parliament of the Commonwealth.

113. (112.) All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage shall be subject to the laws of the State as if such liquids had been produced in the State.

114. (113.) A State shall not, without the consent of The Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth; nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

115. (114.) A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

116. (115.) The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

117. (116.) A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

118. (117.) Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public acts and records, and the judicial proceedings, of every State.

119. (118.) The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

120. (119.) Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and The Parliament of the Commonwealth may make laws to give effect to this provision.

CHAPTER VI.

NEW STATES.

121. (120.) The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of The Parliament, as it thinks fit.

122. (121.) The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of The Parliament to the extent and on the terms which it thinks fit.

123. (122.) The Parliament of the Commonwealth may, with the consent of the Parliament of a State, **and the approval of the majority of the electors of the State voting upon the question,** increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

124. (123.) A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

CHAPTER VII.

MISCELLANEOUS.

124. The seat of Government of the Commonwealth shall be determined by The Parliament, and shall be within territory vested in the Commonwealth.

Until such determination The Parliament shall be summoned to meet at such place within the Commonwealth as a majority of the Governors of the States, or, in the event of an equal division of opinion among the Governors, as the Governor-General shall direct.

125. The seat of Government of the Commonwealth shall be determined by The Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and if New South Wales be an Original State shall be in that State and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

If Victoria be an Original State The Parliament shall sit at Melbourne until it meets at the seat of Government.

126. (125.) The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or functions.

127. (126.) In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

CHAPTER VIII.

ALTERATION OF THE CONSTITUTION.

128. (127.) This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of The Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if, after an interval of three months, the first-mentioned House, in the same or the next session, again passes the proposed law by an absolute majority, with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such a manner as The Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

An **No** alteration diminishing the proportionate representation of any State in either House of The Parliament, or the minimum number of representatives of a State in the House of Representatives, **or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto,** shall not become law unless the majority of the electors voting in that State approve the proposed law.

NOTES.

Debentures Charging French Assets.—M. Olivier E. Bodington, of Paris, writes: "English companies possessing assets in France often issue debentures charged upon 'the whole undertaking of the company' without previously enquiring whether French law permits of such security being perfected, so as to constitute such a charge upon the French assets as is expressed in the debenture deed. In point of fact, French law does not afford the same facilities as exist under English law for charging the assets of a company, and hence it not infrequently happens that an English company is unable to give to the trustees for its debenture-holders the security upon its French assets which has been promised by the terms of the debenture deed.

"It has occurred to the writer to peruse debenture deeds in which the company covenants with the trustees to mortgage French leaseholds in ignorance of the French law, which confines the creation of a mortgage to realty and fixtures. Other such deeds purport to grant a 'floating charge' on French assets. No such charge is possible in France, if only because under French law chattels can be charged only by way of pledge involving delivery, actual or constructive, to the pledgee. In one instance, a large manufacturing company, having important works in France constituting the bulk of its assets, purported to give a 'floating charge' to its debenture-holders. Nothing was done for some considerable time to perfect this charge on the French assets, or even to enquire whether such a charge was possible under French law. Later on, when the company realised that the security as it stood was non-existent as far as the French assets were concerned, it became a serious problem to ascertain what security could be given in France which would most nearly approximate to the terms of the deed. Ultimately the company gave a mortgage to the trustees on the real property; an assignment by way of guarantee was recorded in their favour against the patents; and the company purported to give a pledge of the raw material and stock-in-trade, delivery of which was symbolised by the handing of the warehouse key to the trustees. The validity of this pledge was, however, very doubtful, and the securities taken together were not even remotely equivalent, as is easily seen, to a 'floating charge.'

"In another instance a company had given a charge, in the ordinary form of an English mortgage, purporting to convey the legal title of the (French) mortgaged property to the trustees. In a French mortgage, however, the title to the property is never conveyed, either in form or in reality, to the

mortgagee, but simply involves a charge which is registered in the office of the Registrar of Mortgages, as a lien upon the property, the title and the free disposition of which remains in the mortgagor.

"All these differences of legislation point to the importance for English companies, before purporting to issue debentures charged upon their French assets, of carefully ascertaining the conditions upon which such a charge can be perfected; otherwise they run the risk of French creditors of the company obtaining charges upon the property which would rank above such debenture charge, and the trustees might find themselves unable to enforce the security in France at all." The recent case of *In re* Maudslay illustrates our learned contributor's warning.

French Criticism of English Bankruptcy Law.—The Society is indebted to the *Société de Législation Comparée* for copies of a number of foreign codes and other interesting publications. Among the volumes so presented is one on bankruptcy law in England, with an introduction, historical and critical, by M. Léon Say. In sketching the history of the legislation—for the jurisdiction is nearly all statutory—M. Léon Say justly remarks that we in England have passed from the extreme of rigour to the opposite extreme of laxity. Indulgence to debtors reached its high-water mark under the Act of 1869, and resulted in a state of things which was a disgrace to the country and little short of an encouragement to fraud. We have changed all that now.

Not the least merit of the Act of 1883 is that it has for the first time discriminated between insolvency brought on by misconduct and insolvency brought on by misfortune, and tempered its penalties accordingly: some approximation towards an ideal justice. Furthermore, the Act has in its system of official administration recognised that insolvency is not a matter which concerns merely the debtor and his creditors, but which concerns the whole community, and more particularly the trading portion thereof. These are the two principal contributions of the Act to the edifice of Bankruptcy Law which has been so long a-building. Contrasting our system with that of France, M. Léon Say remarks: "Mais à la différence des lois du continent, la législation anglaise ne prononcé pas des peines contre les personnes qui se rendent coupables de négligences dans l'exercice de leur profession, ou qui abusent du crédit." Is this quite correct? A trader not keeping proper books of account is an offence in bankruptcy, and that form of abusing credit which consists in contracting debts without any reasonable expectation of being able to pay them is certainly provided for. M. Léon Say makes another point. Why should the right to present a bankruptcy petition be dependent on the petitioner or petitioners having a debt of £50 to support it? The idea seems to have been that to set the statutory machinery in motion there ought to be default in payment of a substantial sum; but, as M. Léon Say acutely remarks, non-payment of a small debt is really better evidence of insolvency than non-payment of a large one. In the analogous case of

winding up a company it is worthy of observation that the legislature has not fixed any sum to qualify for presentation of the petition, though it has made non-compliance with a demand for payment of a debt of over £50 conclusive evidence of the company's inability to pay its debts.

Legislation in the United States.—*The State Library Bulletin*, issued by the University of the State of New York, contains the annual review of the legislation of the United States. The summary for 1899 relates to 42 States, and epitomises no fewer than 5,094 Statutes. Of these, 470 relate to taxation and finance, 410 to education and cognate matters, 762 to the administration of justice, 753 to State and local government, and 303 to agriculture. Much of the legislation is of a kind with which we are familiar. Several States have abolished the doctrine of common employment. We hear much of an eight hours' working-day; in some States it is a reality. Not to mention States such as California and West Virginia, where eight hours are declared to be a day's work on all public works, Colorado has established an eight hours' day in mines and smelting-furnaces, except in cases of emergency, and the Missouri Legislature has passed a similar enactment as to all mines, other than coalmines, of a depth of two hundred feet or more. The war against industrial and commercial trusts is briskly carried on; and besides the Federal Anti-Trust Act, twenty-nine States and Territories have specially framed laws for the prohibition of such trusts. It is interesting to note that many States, in order to cope with the arrears of appeals—a general difficulty in America from the Supreme Court downwards—have decided to increase the number of their judges, or to establish an intermediate Court between the Supreme Court and the District Courts. Colorado and Missouri have passed laws making a majority of three-fourths of a jury effectual in civil cases. In an Act intended to strengthen the law as to defamation, California has introduced a startling innovation: it has made it a misdemeanour to publish portraits of residents of the State, except public officers and criminals, without the written consent of the person portrayed.

Some interesting details are given as to the spread of the Torrens system of land registration, which was first adopted by the State of Illinois in 1895. Declared unconstitutional by the Supreme Court, the Act was replaced in 1897 by a new law, the constitutional character of which was upheld. The law is operative in such counties as by popular vote accept it, and as yet it has been accepted by Cook County alone. In Ohio the Torrens system was adopted in 1896; the law was declared unconstitutional in 1897; and it was repealed in 1898. California adopted the system in 1897, and Massachusetts in 1898. We note some attempts to arrive at a just and scientific system of taxation which will be of interest to economists. Montana during the present year created a commission to enquire into the system of taxation, and report to the Legislature in 1901.

Another characteristic of recent legislation is the adoption in many

States of a Bill of Exchange Act, agreeing in the main with the English Act. The Legislatures of several States have struck out new lines by encouraging certain forms of scientific research. Thus Oregon has created the office of State Biologist, whose business is to investigate the animal resources of the State, and the development of such as have economic value. Wisconsin and Michigan and Texas have created a permanent tax commission, intended, among other things, to obtain information, statistical and otherwise, as to the incidence and effects of revenue laws. Wisconsin also has created a commission of taxation, whose business is to collect information with the aid of the local officers.

Some of the most novel Acts relate to marriage. "A measure making the passing of a medical examination a pre-requisite to obtaining a marriage licence passed the North Dakota Senate, but failed of enactment." Similar measures have recently been introduced in a number of legislatures. A Michigan Act provides that no person who has been afflicted with syphilis or gonorrhœa and has not been cured of the same shall be capable of contracting marriage. The penalty fixed by the Act is a fine of $500 to $1,000, or imprisonment for not more than five years, or both.[1]

The Australian Federation Scheme.—The Australian Federation Bill, which we print in this number of the *Journal*, and which will shortly come before Parliament, has been framed with the Canadian Act as a model; but it differs in many respects from the measure of 1867. The effect of ss. 91 and 92 of the latter is to give the Dominion Parliament jurisdiction over all matters not specially assigned to the local legislatures. On the other hand, s. 107 of the Australian measure reserves "every power of a Parliament of a colony," "unless it is expressly vested in the Parliament of the commonwealth, or expressly withdrawn from the Parliament of the State." As Dr. Westerkamp (*Staatenbund und Bundesstaat*) points out (p. 140), the Canadian and Mexican constitutions are exceptional in giving to the central Parliament all powers not expressly given to the local legislative bodies. The following statement shows, side by side, the powers expressly given to the Dominion Parliament and the Australian Federation Parliament:

Canada.	Australia.
1. The Public debt and property.	1. Trade and commerce with other countries and among the States.
2. The regulation of trade and commerce.	2. Taxation; but so as not to discriminate between States or parts of States.
3. The raising of money by any mode or system of taxation.	3. Bounties on the products or export of goods; but so that such bounties shall be uniform throughout the commonwealth.
4. The borrowing of money on the public credit.	4. Borrowing money on the public credit of the commonwealth.

[1] See as to such legislation, *L'Aryen, Son Rôle Social.* By G. de Lapouge, p. 504.

CANADA.

5. Postal service.
6. The census and statistics.
7. Militia, military and naval service, and defence.
8. The fixing of, and providing for, the salaries and allowances of civil and other officers of the Government of Canada.
9. Beacons, buoys, lighthouses, and Sable Island.
10. Navigation and shipping.
11. Quarantine and the establishment and maintenance of marine hospitals.
12. Sea-coast and inland fisheries.
13. Ferries between a province and any British or foreign country, or between two provinces.
14. Currency and coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings banks.
17. Weights and measures.
18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians, and lands reserved for the Indians.
25. Naturalisation and aliens.

AUSTRALIA.

5. Postal, telegraphic, telephonic, and other like services.
6. The naval and military defences of the commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.
7. Lighthouses, lightships, beacons, and buoys.
8. Astronomical and meteorological observations.
9. Quarantine.
10. Fisheries in Australian waters beyond territorial limits.
11. Census and statistics.
12. Currency, coinage, and legal tender.
13. Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money.
14. Insurance, other than State Insurance; also State Insurance extending beyond the limits of the State concerned.
15. Weights and measures.
16. Bills of exchange and promissory notes.
17. Bankruptcy and insolvency.
18. Copyrights, patents of inventions and designs, and trade marks.
19. Naturalisation and aliens.
20. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
21. Marriage.
22. Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.
23. Invalid and old-age pensions.
24. The service and execution throughout the commonwealth of the civil and criminal process and the judgments of the Courts of the States.
25. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States.

CANADA.

26. Marriage and divorce.
27. The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.
28. The establishment, maintenance, and management of penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.

AUSTRALIA.

26. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.
27. Immigration and emigration.
28. The influx of criminals.
29. External affairs.
30. The relations of the Commonwealth with the islands of the Pacific.
31. The acquisition of property on just terms from any State or person for any purpose in respect of which The Parliament has power to make laws.
32. The control of railways with respect to transport for the naval and military purposes of the Commonwealth.
33. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State.
34. Railway construction and extension in any State with the consent of that State.
35. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.
36. Matters in respect of which this Constitution makes provision until The Parliament otherwise provides.
37. Matters referred to The Parliament of The Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.
38. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

Canada.	Australia.
	39. Matters incidental to the execution of any power vested by this Constitution in The Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

It is to be borne in mind that the classes enumerated in s. 91 of the British North America Act do not cut down the powers given to "make laws for the people and the good government of Canada."[1] It is evident that there is dissatisfaction with the clauses which propose to abridge greatly the right of appeal to the Judicial Committee of the Privy Council. There are obvious objections to altering provisions which have been submitted by referendum to the Colonies. These objections do not apply to the first eight clauses, and in particular Clause 2, which provides that the Crown shall be bound by the Act.

French Penal Settlements.—The French system of penal settlements, according to an article in the *Revue Générale du Droit*, seems far from a success. The transportation of habitual criminals naturally presents itself as a convenient way of purging the French capital of its criminals, raising the criminal, and "developing" a colony. In furtherance of these ends, the French Government relies on two principles: (1) the attractions of property, and (2) the regenerating influences of domestic life. It therefore makes grants of lands to the convict ("concessions") for farming purposes, supplies him with agricultural implements and food for six months, and trusts to the sense of proprietorship and stimulus of self-interest to turn him into an industrious colonist.

What is the result? The convict takes possession of his acres, instals himself in the cottage, "crosses his arms," to use the French expression, and lives on the six months' maintenance granted him; then, having enjoyed some months of agreeable relaxation in a comfortable house, he listens tranquilly to the sentence re-consigning him to the penitentiary. The cunning ones prolong their holiday by pretending to work and exercising the pick-axe vigorously when the inspector comes round. Marriage seems equally illusory as a regenerating influence. The State on its part does all it can to smooth the matrimonial path—gives the bride a complete trousseau and thirty months' maintenance, and the husband a further subsidy of 150 francs to start the *ménage* with.

Despite these attractions, the marriages come to less than 5 per cent., and even in this small proportion of cases the convict's impelling motive is stated to be, not the desire of becoming a model husband, but of possessing himself of the 150 francs subsidy. An even more discreditable

[1] Lefroy's *Legislative Powers in Canada*, pp. 308-9.

motive frequently lurks behind. In a country where the disproportion between the sexes is so great as in a penal colony, women are at a premium. Thus a wife—sure of finding a source of profit in prostitution—comes to be regarded as the best part of the convict's "concession," and is too often taken for what she can earn. Coleridge must have had penal settlements in his mind when he remarked that "the world is not a goddess in petticoats, but the devil in a strait-waistcoat."

Legal Education for the Empire.—Lord Russell of Killowen, whenever he speaks, speaks *urbi et orbi*; and it is to be hoped that the striking remarks which he recently addressed to the law students of Nottingham will come home to all lawyers throughout the British Empire.

"There never had been a time," said the Lord Chief Justice, "nor a combination of circumstances so favourable to the establishment of a great law school or legal university as the time and the occasion and the circumstances of to-day. The empire of the Queen extended over a great part of the surface of the globe. She could claim as self-governing colonies or dependencies a vast extent of territory and of population, all governed under systems of law partaking of the great systems of law of other civilised countries of the world. In Canada there was the Code Napoléon, modified by local custom and by imperial and legal legislation; at the Cape of Good Hope there was the Dutch law, modified by local custom and by imperial legislation, and by Acts of the local Legislative Assembly; in Egypt, of which this country had become in fact the dominant director, there was a mixed law, largely French, partly English. They ought surely, in such circumstances as these, to do what they could to direct to these shores and to the schools of learning here students from all this vast field of enterprise and activity. When they got here, the country ought at least to be able to give them some instruction in the laws which they had to administer in the land from which they came, and to which they went again to lead their lives of labour and of usefulness. Yet the system of law in this country was so deficient that although students came here from India, where there was Mohammedan law, modified by imperial law and by the acts of the Legislative Councils, this country had no mental food to offer them, and they were sent back as empty-handed as they came. It could not be too strongly insisted upon that if these men came to this country, whether they were British subjects or merely foreigners living in British dependencies, they should be made acquainted with the systems of law of this country and the character of its institutions, so that they might go forth from these shores voluntary, and perhaps unconscious, missionaries to spread our ideas of popular government and civil rights and general constitutional liberty."

Contradictory Versions of Statute.—In the latest number which has reached us of the *Rapports Judiciaires de Quebec*, a case is reported involving a curious point of construction. The charter of the town of Lévis decrees, it appears, in the French text or version that the qualification of councillors

shall be $1,000. The English text or version, on the other hand, declares that the qualification shall be $5,000. Both texts being equally clear and precise, which, in such a case, is to prevail? It is a well-settled rule of law that in a case of difference the construction is to be adopted which best fulfils the intention of the Legislature, and attains the end for which the statute was passed; but this rule of law does not solve the difficulty, for *non constat* whether a high or a low qualification in such a case does best fulfil the intention of the Legislature. The compass of its course thus lost, the Court arrived at the conclusion that the English and French versions of the statute had an equal force and cancelled one another, and accordingly that the charter of Lévis fixed no qualification at all. This is legal logic with which it is difficult to quarrel, yet it obviously defeats the intentions of the Legislature.

Undue Preference as to Colour.—Among the cases reported in a recent number of the Reports of Queen's Bench at Montreal is one—*Sparrow* v. *Johnson*—relating to the right of ticket-holders and the exclusion of coloured people. The plaintiff, a coloured man, had purchased and paid for two tickets for "orchestra chairs" at a performance at the Academy of Music in Montreal. On asking to be admitted he was refused. He was offered a seat in another part of the building, but the ushers declined to allow him to sit in the orchestra seats. For this refusal he brought an action. Both the judge of first instance and the Court above decided in his favour. The former put his decision on the dubious ground that "the defendants had no right to make any regulation excluding negroes from the theatre or any part of it, and that any such regulation was and is unreasonable." The Court above naturally declined to base their decision on these reasons. "Nous n'adoptons pas ces raisons, non plus l'assimilation, pour la décision de la question d'un théâtre à une auberge ou un hôtel." It was enough to say that the tickets had been sold subject to no conditions as to colour. It will be interesting to watch the development of jurisprudence in countries where races of different colour come more and more in contact.

The Congo Codes.—We have received M. Lycoups' *Codes Congolais et Lois Usuelles*, a handy volume in which all the treaties affecting the Congo State, as well as the laws in force there, are given in full. How rapidly legislation in the young State is increasing appears in the fact that M. Lycoups' volume consists of nearly six hundred pages in double columns. Those who are engaged in amending the laws of our colonies in West Africa, and in particular Colonel Lugard's legal coadjutors in Nigeria, would do well to consult it. They might gather hints as to expressing succinctly and clearly rules to be applied by travellers, merchants, and soldiers. The laws are models of brevity and condensation. The regulations affecting the natives are full of the spirit of humanity, and it is difficult to believe that cruel acts of which we have heard were committed within the territory

of a State so anxious, to judge by its laws, to protect the aborigines. The law of November 8th, 1888, regulating contracts of service with natives, is conceived with the most humane intentions. But to those familiar with the abuses connected with the truck system, it must seem strange that the law should permit payment, without due safeguards, in kind or merchandise. "Le payement en nature pourra remplacer en tout on en partie le payement en numéraire, si le maître y est autorisé par le contrat ou s'il y a accord entre les parties," etc.

Perjury in Bengal.—In *The Trial of Shama Choran Pal*—a small volume published in this country, containing a report of a remarkable trial at the Howrah Sessions of a Hindu accused of the murder of a Brahmin—occur some passages which almost suggest that each community should have its own rules of evidence, its own presumptions *de jure* and *de facto*. One of the chief witnesses for the prosecution was the wife of the murdered man. Part of her story was that, though on good terms with her husband, she was in the habit of eating her evening meal by herself, because her husband would often come home late, and that she did so on the night of the murder —an account not improbable according to Western usages. The counsel for the defence, the late Mr. M. Ghose, argued that this was altogether unlikely. "I ask you (the jury) to consider how far it is probable that a Hindu wife who is on good terms with her husband would ever think of dining and going to bed before her husband returned home? Such a thing may happen in some instances, but you will hesitate to believe that it should have been the ordinary practice in the family."

Here is another striking passage, relative to evidence given by children in Bengal: "It is now a common trick in this country, in false cases, not only to select children as false witnesses, but to select them from among the relatives of the accused persons. . . . Your own experience will tell you that where a man is really guilty of a crime, his own relatives will tell any number of lies to save him rather than come forward to tell the truth; and you may fairly and legitimately presume that if a relative comes forward to give evidence against the prisoner, that fact in itself in this country is cogent evidence to show that the relative himself has some sinister object to serve. . . . You must be aware of the numerous cases already on record, with evidence subsequently shown to be false, of children swearing away their fathers' lives."

Military Courts.—Some indirect effects of the Dreyfus case may be noted. Dr. Speyer, of Brussels, has published in a recent number of the *Revue Politique et Parlementaire* an interesting study on the reform of military jurisdiction in Belgium. Until lately the procedure and composition of Military Courts were the same as in France. But, no doubt influenced by the Dreyfus case, the Belgian Parliament lately made several important changes, the chief being the introduction of a lawyer as a member of the Court. "La présence d'un juriste au milieu des juges militaires,

en faisant penetrer parmi une conception différente du rôle de la justice et un sens plus net de l'indépendance des juges, assurera aux uns une liberté plus complète, constituera pour les autres un frein contre de dangereuses habitudes, et donnera à tous, enfin, une notion plus juste de leur devoirs." The civil member is not to be a special judge, doing nothing else than sit on courts martial; he sits as a legal assessor with the military members of the Court, which is presided over by a soldier.

Dr. Speyer is not satisfied with the position assigned to the civil member, who, it is predicted, will be the "témoin attristé des maladresses qu'il ne saurrait prévenir." The assessor, legal or otherwise, under no system appears to have a great future. On the other hand, as is pointed out, *tribunaux échevinaux*—that is, by judges *d'occasion* under the presidency of a professional judge—have proved a great success in Germany, Norway, and certain Swiss cantons. Many Continental lawyers think that they combine all the advantages of a jury, with few of its disadvantages.

Legitimation by Subsequent Marriage in Queensland.—The Colony of Queensland has, by an Act sanctioned at the end of last year, adopted the principle of legitimation by subsequent marriage. The principal section runs as follows:

> Any child born before the marriage of his or her parents (and whether before or after the passing of the Act), whose parents have intermarried, or shall hereafter intermarry, shall be deemed on the registration of such child as hereinafter provided to have been legitimated by such marriage from birth, and shall be entitled to all the rights of a child born in wedlock. Registration involves a statutory declaration by the husband that he is the father of his wife's illegitimate child.

Legitimation *per subsequens matrimonium* had its origin in a constitution of Constantine. "It enacted," says Mr. Irvine, "that children born in concubinage —a relation recognised by social customs and not regarded with censure— whose parents might have been lawfully married at the time of the birth of such children should be legitimated by the subsequent marriage, provided the man had not already children by a lawful wife. Justinian abolished this restriction, enacting that the law should apply whether the father had legitimate children or not. The children so legitimated were subjected to the *patria potestas*, and entitled to all the rights of lawful children." It is observable, however, that legitimation *per subsequens matrimonium* did not, by Roman law, extend to bastards generally, but was strictly confined to the offspring of the irregular form of marriage known as concubinage. The canon law went further, and legitimated all bastards when their parents afterwards married, provided the father and mother were capable of contracting marriage at the date of the child's conception. In the case of both civil and canon law the object of the law was to encourage persons living in concubinage to marry. Legitimation *per subsequens matrimonium* obtains in Scotland, France, Holland, and other countries, whose system is based on the civil law.

English law, on the other hand, makes it an indispensable condition of a child's legitimacy that it shall be born after lawful wedlock; and Blackstone—"the somewhat indiscriminate eulogist of every anomaly of our law," as Lord Justice James once described him—pronounces this rule as "very much superior to that of the Roman." Starting with the assumption that the main end and design of marriage "is to fix upon some person the care of the child," the points which the author of the *Commentaries* makes against legitimation *per subsequens matrimonium* are four:

(1) The uncertainty of proof that the issue really was begotten by the same man. (French law meets this by requiring that the children shall be recognised by their parents; so does the new Queensland law.)

(2) That it leaves it to parents to bastardise or legitimise at pleasure, and so opens the door to fraud.

(3) That a man may remain a bastard till forty and then be legitimated, whereby the main end of marriage—the protection of infants—is totally frustrated.

(4) Any number may be legitimated twenty years after their birth, which is a discouragement to the matrimonial state.

The last of these reasons is the most tangible. Our law, it may be observed, is already indulgent to human frailty to this extent, that it does not bastardise the child if it be born, though not begotten, in lawful wedlock.

The New Queensland Criminal Code—Some Points in the Draft Bill.—In making their Report on the Draft Criminal Code Bill submitted to them, the Committee of Reference drew the special attention of the Legislature to certain clauses which are innovations on the existing law. These clauses are interesting as illustrating the drift of modern legislation on certain points, and as such may be quoted:

Public Attacks on Religious Creeds (Clause 210).—Any person who, with intent to offer offence to any of Her Majesty's subjects by words publicly spoken, or by any writing, sign, or visible representation publicly exhibited, holds up the doctrines or practices of any religious faith to public derision or contempt, is guilty of a misdemeanour, and is liable to imprisonment for one year. (Omitted from Act.)

Aiding Suicide (Clause 315).—Any person who—

(1) Procures another to kill himself, or

(2) Counsels another to kill himself, and thereby induces him to do so, or

(3) Aids another in killing himself,

is guilty of a crime, and is liable to imprisonment with hard labour for life. (Passed.)

Disorderly Conduct in Parliament (Clause 56).—Any person who advisedly—

(1) Disturbs either House of Parliament while in session, or

(2) Commits any disorderly conduct in the immediate view and presence of either House of Parliament while in session, tending to interrupt its proceedings or to impair the respect due to its authority,

is guilty of a misdemeanour, and is liable to imprisonment for three years. (Passed.)

Maintenance of Litigation (Clause 141).—Any person who, having no valuable interest in the subject-matter of a litigation, assists the plaintiff in the litigation by providing money for carrying it on, is guilty of a misdemeanour, and is liable to imprisonment for two years.

It is a defence to a charge of the offence defined in this section to prove that the plaintiff in the litigation was a relative of the accused person, or stood in some relation to him which rendered the giving of such assistance reasonable and proper, or that the assistance was given without any desire to harass the defendant, and in the honest belief that the plaintiff was seeking redress for some wrong or breach of contract sustained by him and was unable to obtain it without such assistance. (Omitted ; also a similar clause as to champerty and buying and selling disputed titles.)

Obtaining Credit by Fraud (Clause 436).—Any person who, when incurring any debt or liability, obtains credit by a false pretence or by means of any other fraud, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years. (Omitted from Act.)

Clauses as to hunting deer in enclosed land, taking or killing hares in a warren in the night-time, stealing animals at night with violence, snaring or setting engines for taking deer or hares, and injuries to trees, shrubs, etc., were omitted.

"**Actor sequitur Forum Rei.**"—One or two points of interest arose in *Christien* v. *Delanney*, decided lately before Macpherson J. and Stevens J. in the High Court at Calcutta. J. P. Delanney, son of a French subject who had settled in Comilla, in British territory, was born and resided there, and left a son, P. Delanney, who also resided there, and who called himself a British subject. By the will of J. Delanney, P. J. Delanney was to be appointed executor. The will directed monthly payments of one hundred rupees to Madame Montie, who resided at Chandernagore, in French territory in India. The universal legatee of Madame Montie brought a suit in the Chandernagore Court against the executor. He did not appear, though he was served ; and judgment was given against him in his absence—a judgment perhaps warranted by some of the recent decisions of the Cour de Cassation in *Forgo's* case (see Mr. Sewell's recent book thereon). Upon this judgment a suit was instituted in an English Court. It was dismissed, and the High Court, of course, upheld this decision. It was argued that, though a British subject, Delanney still, according to French law, owed allegiance to the French Government. "No authority has been shown us," said the Court, "for the contention that the Chandernagore Court has jurisdiction over him, even if he is a

Frenchman residing in British India, much less if he is a British subject domiciled there." So far as any point of law was involved, the case was substantially similar to *Gurdyal Singh* v. *Raja of Faridkalt* (I.L.R. 22 Calc. 222; L.R. 21 I.A. 171), decided by the Judicial Committee.

Free Advocacy.—A correspondent calls attention to an article in a recent number of the *Preussiche Jahrbücher* on "*Advokatur und Rechtsanwaltschaft.*" Our correspondent quotes part of the conclusion:

> At the end of 1898 an attempt was made at the instance of Justizrath Goldschmidt, the President of the Society of Solicitors at Berlin, to establish offices where legal advice might be had without payment. Adverse influences, however, nipped in the bud these efforts, so well calculated to further the interests of the profession. Moreover the example was not followed in any other place. This attempt nevertheless leads one to believe that there is making way, although slowly, the opinion that *Rechtsanwaltschaft* by no means fulfils its mission by simple representation of a party before the Court and the management of such-like legal matters, but that in order to maintain its position in the legal system it must devote itself to far higher aims. Offices for free consultation and the defence of accused persons without means would increase the social importance of the profession of attorney, and awake that spirit of unselfishness to which the French and Belgian Bars owe their power and their great dignity.

The Meaning of "Liquor."—What is liquor? Is ginger ale a liquor? This is a point which a Canadian Court has lately had to determine, not in the abstract, but under the Liquor Licence Act of the Colony, which forbids a licensee supplying a person, apparently under the age of twenty-one, with "any description of liquor whatever." Words get worn into strange meanings by the play of popular usage, just as stones do by the incessant action of the waves; and under this influence, liquor, whatever its original meaning, has come more and more to be a convertible term with intoxicating liquor, and that was what the Court held the Act meant. The case recalls the story of Mr. Justice Maule when he was asked by the bailiff who had sworn to give the jurymen "no meat or drink" whether he might give a juryman some water. "Well," said the judge, "it is not meat, and I should not call it drink. Yes, you may." Preventatives for drunkenness are various. The Liquor Licence Act contains one which is worth noting. By this a wife, parent, etc., may give notice to any licensed hotel or saloon keeper not to deliver "intoxicating liquor" to the person having the habit of drinking intoxicating liquor to excess. If any person then, with knowledge of this notice, gives or sells the inebriate any liquor, he is to incur for every such act a penalty not exceeding $50.

Privy Council Appeals.—Mr. A. Wood Renton sends the following addenda to his article on "Indian and Colonial Appeals to the Privy Council" (*Journal of Society of Comparative Legislation*, December, 1899).

INDIAN AND COLONIAL, ETC., APPEALS TO THE PRIVY COUNCIL.—The

following alterations in, and addenda to, the article on this subject in *Jour. Comp. Leg.*, N.S., No. iii., p. 345, may be noted:

BERMUDA.—At p. 355, col. 2, delete reference to "Order in Council of July 18th, 1894."

BRUNEI (at p. 359) and SOMALILAND (at p. 376).—The Brunei Order in Council, 1890, and the Somali Order in Council, 1889, are repealed by the Somali and Brunei (Repeal) Order in Council, 1900 (*Lond. Gaz.*, 1900, p. 281).

GUERNSEY.—At p. 373, col. 2, delete reference to "Parl. Rep., 1834 [323], Dec. 20th, 1885."

JERSEY.—At p. 369, note Order in Council of May 19th, 1831, in Stat. R. and O., 1899.

NIGER COAST PROTECTORATE (now PROTECTORATE OF SOUTHERN NIGERIA).—As from Jan. 1st, 1900, the Africa Order in Council, 1889, no longer applies to Southern Nigeria. (Order in Council, 1899; *Lond. Gaz.*, 1900, p. 71, *q.v.* for present juridical arrangements.)

Colony, Possession, etc.	Authority under which appeals are tendered.	Appealable amount.	Limit of time within which leave to appeal must be asked.
NORTH-EASTERN RHODESIA.	North-Eastern Rhodesia Order in Council, 1900 (*Lond. Gaz.*, 1900, p. 901), Arts. 28, 29.	Appeal lies from High Court of North-Eastern Rhodesia in civil matters when the amount or value in dispute exceeds £500.	Appeal to be brought within such time and in such manner as regards form and transmission of appeal as rules of procedure made by her Majesty in Council may prescribe.

NORTHERN NIGERIA.—The Africa Order in Council, 1889, no longer (as from Jan. 1st, 1900) applies to Northern Nigeria. (Northern Nigeria Order in Council, 1899; *Lond. Gaz.*, 1900, p. 69, *q.v.* for present juridical arrangements.)

SOMALILAND.—See BRUNEI, *supra*.

The Size of Colonial Statutes.—Through the courtesy of the Colonial Office we have received the following statement, prepared by the librarian, showing the remarkable variety in the size of the Statutes of various colonies:

IMPERIAL STATUTES { Annual ... about $9\frac{1}{2} \times 6\frac{1}{4}$. Local Acts „ $10\frac{1}{2} \times 7\frac{1}{2}$. Revised ... „ $10 \times 6\frac{1}{4}$.

COLONY.	SIZE OF STATUTES.
NORTH AMERICAN—	
Canada	$9\frac{3}{4} \times 7$.
Ontario	$9\frac{1}{2} \times 7\frac{1}{4}$.
Quebec	$9\frac{3}{4} \times 6\frac{1}{2}$.
Nova Scotia	Revised $9\frac{3}{4} \times 6\frac{1}{2}$. Annual $8\frac{3}{4} \times 6\frac{1}{4}$.
New Brunswick	Revised $9\frac{3}{4} \times 6\frac{1}{2}$. Annual $9 \times 5\frac{1}{2}$.
Prince Edward Island	$8\frac{1}{2} \times 6$.
British Columbia	$10\frac{1}{2} \times 7$.
Manitoba	Revised $10 \times 6\frac{1}{2}$. Annual $9\frac{1}{2} \times 6\frac{1}{2}$.
North-West Territories	$8\frac{1}{4} \times 5\frac{3}{4}$.
Newfoundland	Consolidated $10 \times 6\frac{1}{2}$. Annual $9\frac{1}{4} \times 6\frac{1}{4}$.
AUSTRALIAN—	
New South Wales	Revised $9\frac{3}{4} \times 6\frac{1}{4}$. Annual (lately reduced) $11 \times 8\frac{3}{4}$.

COLONY.	SIZE OF STATUTES.
AUSTRALIAN (*continued*)—	
Victoria	11 × 7½.
Queensland	Revised 9¾ × 6¼. Annual 9½ × 6.
Tasmania	Revised 10 × 6¼. Annual 12½ × 8½.
South Australia	11 × 8.
Western Australia	10¾ × 7½.
New Zealand	10½ × 8
Fiji Islands	1 Vol. (1875 to 1878) 9½ × 6¼. Annual 13 × 8.
Western Pacific High Commission	13 × 8.
British New Guinea	Collected Edition 9½ × 6. Annual 13 × 8.
WEST INDIES—	
Jamaica	10½ × 8¼.
Turk's Islands	13 × 8.
Cayman Islands	10½ × 8¼.
British Honduras	Consolidated 10 × 6. Annual 13 × 8.
British Guiana	Revised 9¾ × 6½. Annual 13 × 8.
Bahamas	Revised 9½ × 6½. Annual 13 × 8.
Trinidad and Tobago	10 × 6 (Trinidad). 13 × 8 (Tobago).
Barbados	Revised 9¾ × 6. Annual 13 × 8.
Windward Islands—	
Grenada	Revised 13½ × 8½. Annual 13 × 8.
Saint Vincent	Revised 10 × 6½. Annual 13 × 8.
Saint Lucia	Revised 10¼ × 7¼. Annual 13 × 8.
Leeward Islands—	
Antigua	Revised 11 × 7¼. Annual 13 × 8.
Montserrat	13 × 8.
Saint Kitts—Nevis	Revised 10 × 6½. Annual 13 × 8.
Virgin Islands	13 × 8.
Dominica	Collected 11 × 7. Annual 13 × 8.
Bermuda	Revised 7½ × 6¼. Annual 10½ × 7½.
Falkland Islands	13 × 8.
AFRICAN—	
Cape of Hope	Revised 7¾ × 6. Annual 12½ × 8.
Bechuanaland Protectorate	13 × 8.
Southern Rhodesia	10½ × 8¼.
Natal	9½ × 6¼
Saint Helena	13 × 8.
Sierra Leone	Collection 6 Vols., all different sizes; average 12¾ × 8½. Annual 13 × 8.
Gambia	Collection 12½ × 8. Annual 13 × 8.
Gold Coast	Revised 9¾ × 6. Annual 13 × 8.
Lagos	Revised 10 × 6. Annual 13 × 8.
Niger Coast Protectorate (Southern Nigeria)	Annual 20 × 15.
MEDITERRANEAN—	
Gibraltar	Revised 9¾ × 6½. Annual 13 × 8.
Malta	13 × 8.
Cyprus	13 × 8.
EASTERN—	
Ceylon	Revised 10 × 6. Annual 10 × 6 (sometimes 11½ × 8).
Hong Kong	Revised 10¾ × 8½ and 10 × 6½. Annual 13 × 8.
Labuan	13 × 8.
Mauritius	Revised 10½ × 6¾. Annual 9¾ × 6¾.
Seychelles	10 × 6½ and 13 × 8.
Straits Settlements	Revised 10 × 6. Annual 9 × 6.
Federated Malay States	Various, mostly 10 × 6 and 13 × 8.

N.B.—The measurements of the Revised Editions are when bound.

Grenada has produced the most remarkable monstrosity ($13\frac{1}{2} \times 8\frac{1}{2}$), but it is nearly equalled by some other West Indian islands. As we have already pointed out, the most convenient size is $10 \times 6\frac{1}{2}$.

Private Property at Sea.—The latest number of the *Revue de Droit International et de Legislation Comparée* contains an article by Mr. Thomas Barclay on "The Inviolability of Private Property at Sea." The United States, the writer says, are in favour of it; England as strongly opposed. Both are actuated by their private interests. Napoleon Bonaparte thought no ruder shock could be given to England than to compel her to abandon her rights on the sea. Nelson was of the same opinion. He thought nothing could be more fatal to the maritime interests of his country than the adoption of the principle "Free ships, free merchandise." England's adherence or non-adherence to the principle of inviolability must, Mr. Barclay thinks, depend on the special circumstances of each war in which it engages. The considerations to be taken into account in a war with the United States would be quite different from those in a war with France or Germany. In the former case it might be to the interest of both parties to localise operations and to disturb transatlantic commerce as little as possible. In the latter, England might think that closing the high seas to all traffic by merchants of the enemy would be highly advantageous. England, it is often suggested, would profit by the inviolability of its commerce, seeing it is exposed to a combination of powers against it who might prevent its exercising sufficient protection over its commerce to render useless the employment of neutral vessels. But Professor Westlake has demonstrated, Mr. Barclay thinks,

que la mise de navires sous pavillon neutre que ne serait point effectuée bonâ-fide, ne serait pas valable a l'égard d'un belligérant, et qu'il serait vite reconnu que pour les cargaisons transportées par des vaisseaux dont l'inscription aurait été uniquement déterminée par la guerre, les tarifs d'assurance seraient presque aussi élevés sous le pavillon d'un neutre que sous celui d'un belligérent.

Mr. Barclay's conclusion is that the exigencies of war necessitate the preservation of the power of destroying the forces of the enemy, and that this necessity will always prevent belligerents abandoning their right of seizing all the property of the enemy, whether it belongs to individuals or to the community, whenever it can help them in attaining their ends. All the ameliorations introduced have only had the result, so far as private property is concerned, of preventing reckless destruction and plundering, and of equalising the damage. Much to the same tenour is Captain Mahan's warning in the last number of *Harper's Magazine* against "signing away prerogatives sanctioned by long prescription, such as the seizure of so-called private property, embarked in mercantile adventure."

What is "Territory"?—It is not only in England that the existence of protectorates is giving rise to difficulties. A writer in the *Archiv für Oeffentliches Recht* deals with the question, much debated, whether the

German patent law is in force in the *Schutzgebiete* of the Empire. The question mainly turns on the meaning of the word "inland." The writer argues that *Schutzgebiete*, having become purtenances of the Empire, are "*ausland*" as contrasted with "*inland*." The whole discussion shows that modern terminology as to the ambit or purview of laws—*e.g.* "territory," "realm," etc.—needs remodelling in the light of the facts connected with protectorates, spheres of influence, etc., and the exercise of foreign jurisdiction.

The Congress of Comparative Legislation.—The French Society of Comparative Legislation proposes to hold a Congress in Paris at the end of July and the beginning of August. We have received a copy of a report by Professor Saleilles on the objects of the Congress. They are comprehensive, and are thus defined:

1. Au point de vue de la conception de la science du droit comparé, définir d'après quelles méthodes il y aurait lieu de procéder aux trois fonctions qui en constituent l'objet propre, et qui sont, par rapport aux diverses législations en présence, la constatation, la comparaison et l'adaptation.
2. Au point de vue doctrinal, préciser le rôle du droit comparé comme méthode d'enseignement.
3. Au point de vue des solutions juridiques, rechercher dans quelle mesure les conclusions tirées du droit comparé peuvent et doivent être utilisées, soit par voie législative, soit par voie coutumière et doctrinale se traduisant par le procédé de l'interprétation judiciaire, soit par voie d'entente internationale.
4. Au point de vue de la pratique des affaires, rechercher et organiser des moyens d'entente pour l'information et la connaissance du droit étranger.

Some day the English Society may follow the example of the elder sister, but, as becomes youth, on a less ambitious scale.

Court for the Trial of High Crimes and Misdemeanours.—In the *Revue Politique et Parlementaire*, M. Lagresille contributes, *apropos* of political trials in France, an article on "*Les Hautes Cours de Justice en France, depuis la Révolution jusqu'à nos jours*." He points out that almost all foreign constitutions make provision for a *haute jurisdiction*, charged with the trial of political offences, or offences committed by public personages. In Italy it is the Senate. Such is the case also in Spain. According to the Portuguese Constitution, the Chamber of Deputies has cognisance of offences committed by Ministers and Counsellors of State. The Chamber of Peers has cognisance of offences committed by members of the Royal Family, peers, and deputies. In the United States the corresponding Court is the Senate. Of course, with us, Parliament may deal with high crimes and misdemeanours. While here the ordinary tribunals, at all events in modern times, are alone invoked, it is not so in the case of some of the countries named by M. Lagresille.

The Hague Conference.—It may be interesting to state what has been done by the States represented at the Peace Conference at the Hague since the deliberations of last summer. All the twenty-six States there represented have signed the five conventions and declarations agreed to with respect to

international arbitration, the laws and customs of war, the Geneva Convention, and the prohibition of projectiles containing asphyxiating gas, etc., though some of the signatures are subject to unimportant reservations. But on March 15th the Dutch Ministry of Foreign Affairs was unaware of any Power having ratified the conventions. It may be added that the Arbitral Court cannot come into operation until nine States have ratified the Arbitration Convention.

Mr. Haldane's Proposal as to the Final Court of Appeal of the Empire.—In an address which Mr. Haldane, Q.C., delivered the other day to the Scots Law Society, he threw out suggestions as to what should be a composition of the final Court of Appeal for the Empire.

> He would add to them (the present members) three representative great lawyers from different parts of the Empire, giving them a sufficient but moderate salary from the Imperial Exchequer to compensate them for their general services, and leave it to the Colonies which they represented to make up the salaries to an amount sufficient to maintain the dignity and importance of the position. He would make these new Colonial representatives life peers in the House of Lords, so that they might sit there as well as at Downing Street, and he would thereby take the first step towards infusing new blood into that body, and making it a convenient Chamber for Colonial representation. In this way there would be one great Imperial tribunal sitting when necessary in two divisions, and hearing the appeals not only of Scotland, England, and Ireland, but of India and all the Colonies. The Colonies would take pride in such a body, because it would become in part their own. There was a larger view of Imperialism than that which was talked of at elections, and one which was less controversial. That view refused to recognise in the Crown and the system of Imperial defence the only features of our existence as an Empire. It might be that in the sphere of education, in the foundation which some were at present endeavouring to compass of an Imperial University, a new link could be added, but this at least Imperialists, such as he himself desired to be reckoned, held to be certain, that in the administration of justice and in the existence of a great but too scantily recognised central tribunal they had one of the most real bonds that could hold together the distant parts of the Queen's dominions in those relations which only a common heritage could give.

Injuries by Animals and the Law of Canada.—In Canada the law as to injuries by animals approximates closely to the law of France and of the Continental nations, and knows nothing of the English law of "Scienter." By Art. 1055 of the Civil Code of the Dominion, "Le propriétaire d'un animal est responsable du dommage que l'animal a causé soit qu'il fût sous sa garde ou sous celle de ses domestiques, soit qu'il fût égaré ou échappé." On the face of it, this article imports an absolute liability; but as interpreted in the light of Art. 1053 of the Code, fault on the part of the proprietor is an essential element of responsibility. The result is that it is open to the proprietor of an animal which has committed any mischief to show that he has done everything to prevent an injury, and that no fault, negligence, or imprudence is imputable to him. In a recent case in the Superior Court at Montreal, where a stableman had been kicked by a mare which

was not vicious, but only skittish or ticklish (chatouilleuse), an ingenious attempt was made to neutralise this doctrine by putting this dilemma: "De deux choses l'une; ou le propriétaire n'a pas pris toutes les précautions que la prudence commandait et alors il est en faute; ou il s'agit d'un animal tellement méchant que toutes les précautions imaginables pour l'empêcher de nuire sont inefficaces; et alors il est en faute par cela seul qu'il le conserve." In other words, the very fact that harm has been done postulates the existence of fault. But the Court very plainly exposed the fallacy: "Human affairs are not to be governed by syllogisms. It is no doubt true that every accident could be prevented if human beings could foresee every circumstance and event of life. Legal fault does not depend upon any such theoretical perfection of human intelligence." All that the law requires of a man is that he should exercise an intelligent foresight, but the standard of intelligence it exacts is that of the average man.

Gang Rape in India.—Rape under the Indian Penal Code is already heavily punished. The penalty is transportation for life; but even this has been found inadequate to deal with a very atrocious form of the offence—"gang rape"—where a number of men join together to violate a woman. The offence, according to a minute of Mr. Justice Wilkins, is prevalent only in certain districts of Eastern Bengal, and is committed in a peculiarly brutal and inhuman manner. The perpetrators have always been Mohammedans of the lower classes. Their victim is generally a young married girl. They wait till she is left unprotected, by the absence of her husband or parents, and they then attack her, and forcibly carry her off. The motive is not always the same,—at times it is revenge, at times merely the gratification of their own passions,—but the consequences to the victim are of course terrible and irreparable. The Legislative Council of India have now passed a clause for punishing with whipping (in addition to any other punishment) any member of such a rape gang who abets or commits a rape of this kind.

An English School of Law in Egypt.—By far the most interesting passage in the latest report by Mr. McIlwraith, the Judicial Adviser of the Egyptian Government, is the announcement that an English school of law has been established at Cairo. Hitherto only two languages were employed as mediums of instruction—French and Arabic; the native codes had not been translated into English, and the commentaries in use were the works of French and Belgian lawyers. Now, however, provision has been made for an English section in the Khedivial school of law on lines similar to those of the French section. Instead of being dependent solely on French commentaries and French decisions, which are "often more misleading than helpful to the student of Egyptian law, which is gradually acquiring a distinct and separate individuality of its own," an authoritative commentary in English is to be published. The English section of the school of law is, says Mr. McIlwraith, "an accomplished fact"—though, by the way, the attendance is smaller than the attendance in the French section.

The Right Hon. Lord Russell of Killowen.

Lord Chief Justice of England.

President of the Society of Comparative Legislation.

Death of the Lord Chief Justice of England.

WITH the deepest regret we learn, as the JOURNAL goes to press, of the death of Lord Russell of Killowen, the Lord Chief Justice of England. To the profession, of which he was the ornament and pride, to the country, which recognised in him a great advocate and judge, and to friends innumerable, his loss is irreparable. He died in the fulness of his powers, just when a new region of civic usefulness was opening before him, and at a time when the confidence reposed in him by other countries, no less than by his own, marked him out as a mediator in the disputes of nations. We little imagined, when, not many days ago, in response to our request, he handed us his portrait for reproduction in the JOURNAL, that he would never see it appear. It was his lot to be the foremost advocate of his generation; but whatever career he had chosen—soldier, statesman, ecclesiastic, or lawyer—he was destined to pre-eminence. As President of the Society of Comparative Legislation, he served it with unstinted zeal (one of the last letters which he dictated from his death-bed related to the Society's affairs), and he had a conception of its functions and its future which few but he could realise. During the last few weeks he was meditating an address, to be delivered by him as President of the Society, on "The British Empire as a Legal Unity." That, alas! is one of the many things lost to the Society by the disappearance of a masterly and generous spirit and a far-seeing and comprehensive intelligence.